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ABSTRACT

This manual is designed to help students' advocates in their work on school discipline issues--when representing students in school disciplinary hearings, preparing court challenges, or working with groups of students and parents to change school disciplinary policy. The main body of the book is devoted to analysis of students' legal rights. The first part addresses substantive rights, which limit either the kinds of conduct schools can prohibit or the kinds of punishment schools can impose. The second part addresses procedural rights--the school's obligation to follow certain procedures when pursuing disciplinary policies. Subsequent parts of the book include a guide for access to student records and to information about the school system that can be essential in discipline advocacy; materials on remedies, disciplinary alternatives, and strategies for legal services advocates; a section on the rights of private school students; and a summary. The authors caution that while an attempt has been made to make the materials provided comprehensive, users must realize that the law is constantly developing and that the manual must be read in conjunction with the laws and regulations of the individual state and school system concerned, particularly since these may grant additional rights. (Author/PGD)

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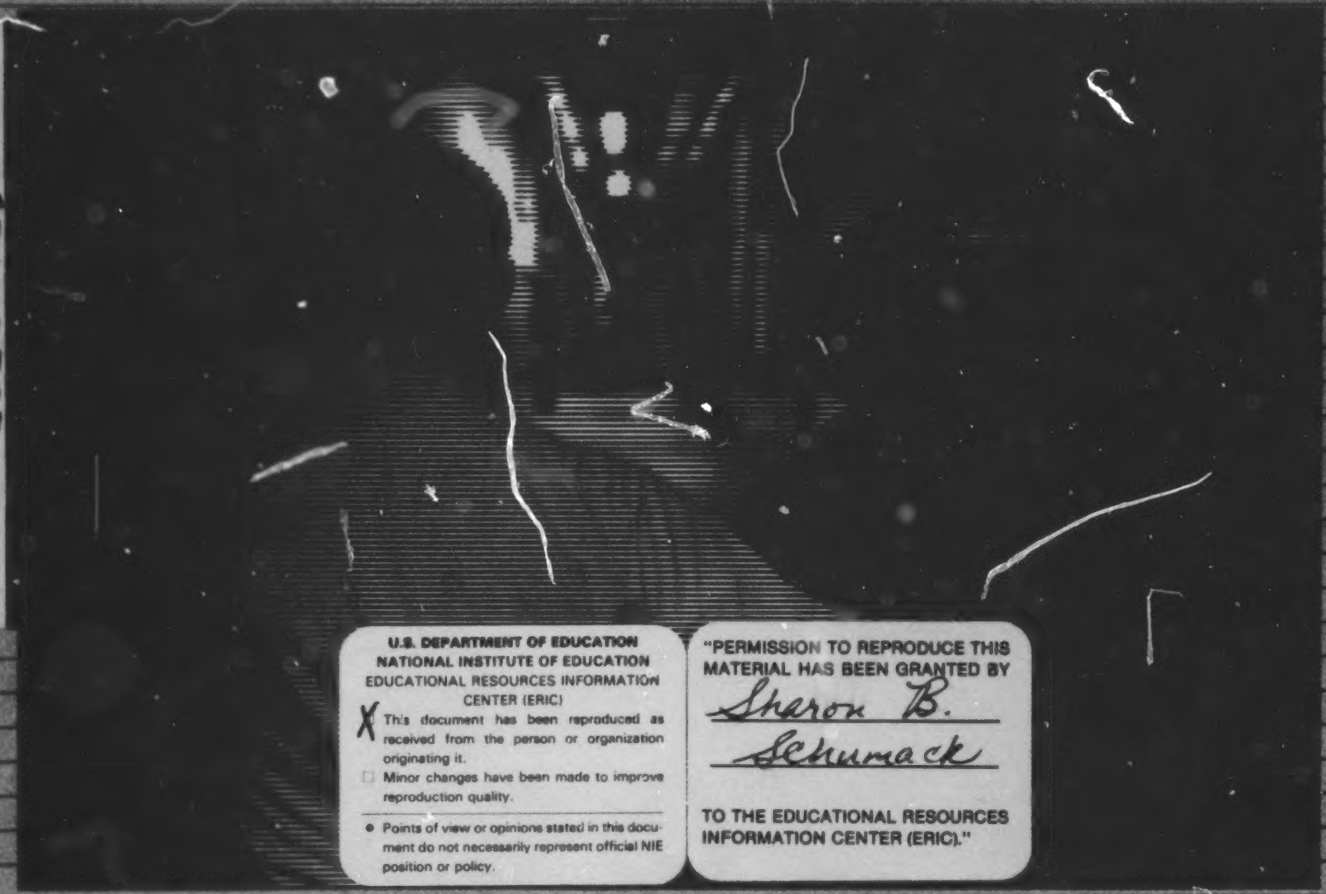

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SCHOOL DISCIPLINE and STUDENT RIGHTS

an advocate's manual

EA 015 350

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Paul Weckstein

Revised Edition, 1982

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INTRODUCTION

This manual is designed to help students' advocates in their work on school discipline issues -- when representing students in school disciplinary hearings, preparing court challenges, or working with groups of students and parents to change school disciplinary policy and practices. It was developed because of the frequency with which we get requests for legal assistance from legal services staff and their clients on school discipline matters.

Contents of this book: The main body of the book is devoted to an analysis of students' legal rights.

The first part (Sections I through VIII) addresses "Substantive Rights." These are rights which limit either the kinds of conduct which schools can prohibit or the kinds of punishment which schools can impose for misconduct.

The second part (Sections IX through XI) addresses "Procedural Rights" -- the school's obligation to use certain procedures when making a decision to punish a student.

Other sections include a guide for access to student records and to information about the school system which can be essential in discipline advocacy; materials on remedies, disciplinary alternatives, and strategies; a section on private schools; and a summary.

Cautions: While the legal materials attempt to be comprehensive, two cautions are in order. First, the law in this area is constantly developing and changing through new court decisions, making any manual somewhat out of date from the moment it is printed.* Certain principles, however, tend to remain fairly constant over time.

Second, and most important, THIS MANUAL MUST BE READ IN CONJUNCTION WITH THE LAWS AND REGULATIONS OF YOUR STATE AND YOUR LOCAL SCHOOL SYSTEM. While state laws may not legally deprive students of rights granted at either the state or federal level, both state laws and local rules may grant students additional rights. This is criticial especially for procedural rights, where many states and local school systems provide notice and hearing procedures which go beyond the constitutionally required minimums.

This manual does contain some state court cases and discussion of certain general state law principles, but it does not include particular state laws or discipline procedures, nor, of course, the additional rights granted by local systems.

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*The manual includes cases reported in the Center's Education Law Bulletin through Number 18 (March 1982). See future issues for new cases.

GUIDE TO LEGAL NOTATIONS AND SYMBOLS USED IN THIS MANUAL

General Format for Citing Cases, Journals, Regulations, Etc.

There is a standard format used for giving basic information which can be used for locating cases, statutes, regulations, journal articles, and other information. For example:

Wood	v.	Davison	351	F.Supp.	543	(N.D.Ga.	1972)
Plaintiff (person suing)		Defendant (person being sued)	Volume #	Reporter	Page #	Court	Date

In other words, the case in which Wood sued Davison was decided by the federal district court for the Northern District of Georgia in 1972. The court's opinion can be found in volume 351 of the Federal Supplement at page 543.

The reporters are bound volumes, in which published court decisions, statutes (laws passed by the Congress or state legislatures), and regulations are printed. These volumes can generally be found in law libraries at any law school, at state houses, and at federal and state courthouse buildings.

The same basic format is used for other kinds of information. For example,

6 J. Law & Ed. 273 (1977)

means page 273 of volume 6 of the Journal of Law and Education, published in 1977.

Where more than one page number is listed -- for example, "495 F.2d 615, 623" -- the first page number (615) indicates where the opinion begins, while the second page number (623) indicates where the specific point being cited can be found. "495 F.2d at 623" also refers to a point being made at page 623 of the opinion.

Citations to Court Decisions

U.S. Supreme Court Abbreviations -- "U.S." or "S.Ct."

394 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) -- Decisions of the United States Supreme Court, which can be found in any one of three published reporters: the United States Reports (U.S.), the Supreme Court Reporter (S.Ct.), or the Lawyer's Edition (L.Ed.). In this manual references are usually made to only one of the reporters.

In 394 U.S. 294, the 394 gives the volume number, the U.S. indicates United States Reports, and the 294 is the page number. The decision was reached in 1955. Supreme Court citations do not contain a court reference next to the date inside the parentheses. Instead, the court is indicated by the reporter abbreviation (U.S. or S.Ct.) alone.

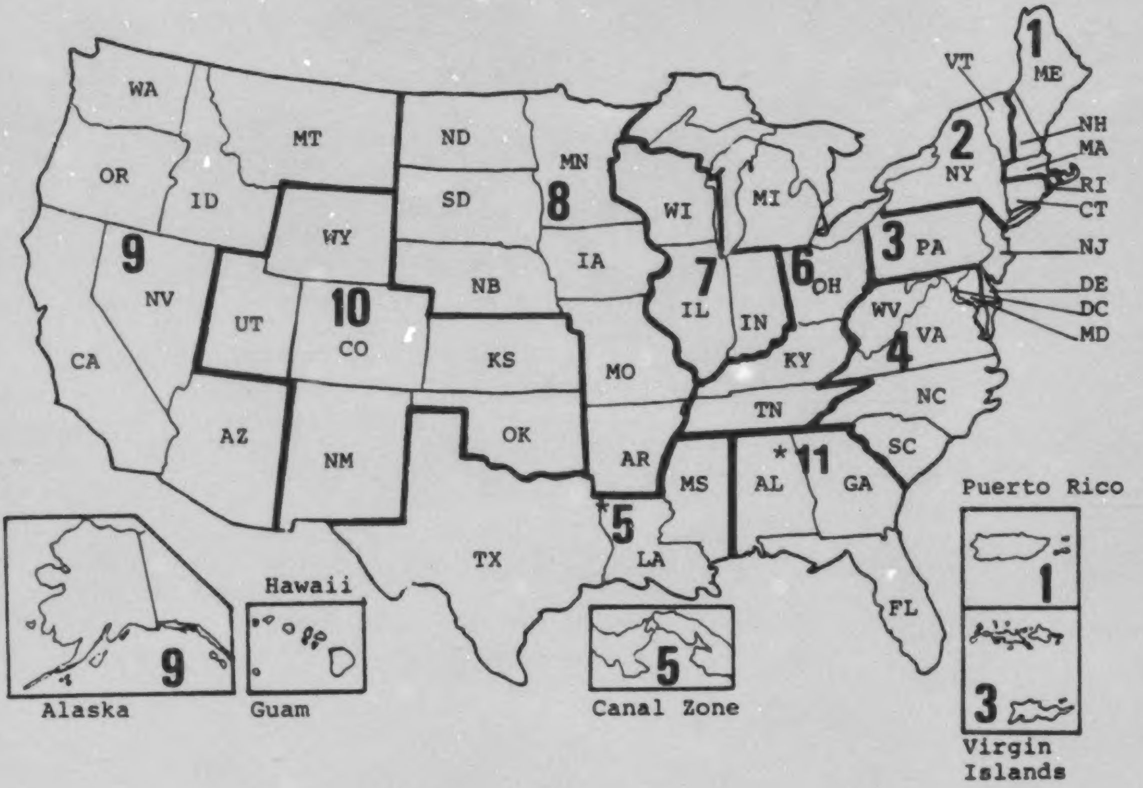
Federal Court of Appeals Abbreviations -- "F.2d" and "Cir."

424 F.2d 1281 (1st Cir. 1970) -- A decision by a federal court of appeals, in this case the United States Court of Appeals for the First Circuit, in 1970. This decision can be found in volume 424 of the Federal Reporter, 2nd Series at page 1281. (Decisions of courts of appeals prior to 1924 are found in the Federal Reporter, abbreviated F.)

The courts of appeal are the next highest level in the federal court system, and generally review the decisions of the federal district courts.

There are eleven circuits, each consisting of several states (except for the D.C.Cir., which consists solely of the District of Columbia), and the court of appeals for that circuit reviews the decisions of the district courts within that region as follows:

THE TWELVE FEDERAL JUDICIAL CIRCUITS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MD
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6
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Alaska
Hawaii
Guam
Canal Zone
Puerto Rico
Virgin Islands

* Prior to October 1, 1981, what is now the 11th Circuit was part of the 5th Circuit. All 5th Circuit decisions issued prior to that date are treated as binding precedents in the 11th Circuit.

Federal District Court Abbreviations -- "F.Supp." and "D."

300 F.Supp. 748 (N.D.Miss. 1969) -- A decision by a federal district court, in this case in the Northern District of Mississippi in 1969. The decisions of these courts are reported in the Federal Supplement, in this case at page 748 of volume 300.

Each state has at least one federal district court. In states which have only one, it is abbreviated as D., such as D.Mass. In addition to North, South, East, or West, a few states also have a Middle District (M.D.Ala.) or a Central District (C.D.Cal.). The district courts are the lowest, or trial court, level in the federal court system.

State Court Abbreviations

62 N.J. 473, 303 A.2d 273 (1973) -- A state appellate court decision. These decisions can be found in either or two places, the state reporter (here page 473 of volume 62 of the New Jersey Reporter) or the regional reporter which reports the state appellate cases for several states in a region (here the Atlantic Reporter, 2nd Series). Other regions are Pacific (P.), South Western (S.W.), North Western (N.W.), Southern (So.), South Eastern (S.E.), and North Eastern (N.E.). Each of these regional reporters also has a second series for more modern cases.

The particular court will be indicated in the parentheses or can be determined by looking at the reporter abbreviation. Where, as in the case above, no court level is indicated, the decision was issued by the state's supreme court. Examples of lower state court abbreviations are "Ill.App." (Illinois Court of Appeals) and "Pa.Super." (Pennsylvania Superior Court). [In New York State, however, the highest court is actually the Court of Appeals (Ct.App.), while the state Supreme Court (Sup.Ct.) is in fact a lower level court.]

Unreported Decisions -- "C.A. No."

C.A. No. 74-F-418 (D.Colo., Feb. 5, 1975) (Clearinghouse No. 13,046) -- An unreported decision, one which is not published in a regular reporter. The citation includes the docket number (C.A. No. 74-F-418), the court of decision (the federal District Court for the District of Colorado), and the specific date of decision. With this information, the opinion can be obtained from the clerk of the court.

Also included above is a reference to the National Clearinghouse for Legal Services, which maintains a library consisting of complaints, legal briefs, and opinions in poverty law cases, including education cases. By referring to a case's Clearinghouse number, it is possible to obtain copies of pleadings and opinions for unreported cases from the National Clearinghouse for Legal Services at 500 North Michigan Ave., Suite 1940, Chicago, Illinois 60611. Phone (312) 353-2566. (Free to legal services attorneys, at a charge to others.)

United States Law Week -- U.S.L.W.

49 U.S.L.W. 2098 (7th Cir. 7/18/80) -- Very recent decisions which have not yet been published in permanent reporters can sometimes be found in "advance sheets" such as United States Law Week.

U.S. Law Week publishes the full text of all Supreme Court opinions and proceedings, as well as excerpts from a limited number of federal district and appeals courts and state courts

Other Notations

§ -- Section.

supra -- Above.

aff'd -- Affirmed. The higher court, cited after the abbreviation, has reviewed and upheld the decision of the lower court, cited before the abbreviation.

aff'g -- Affirming. The first citation is to the higher, reviewing court, and the second is to the lower court decision.

rev'd, rev'g -- Reversed, Reversing. On appeal, the higher court has reviewed and reversed the decision of the lower court.

vacated as moot -- The order of the lower court has been lifted because by the time the case was appealed, there was no longer a "live" controversy. This might occur, for instance, when a court refuses to order a school to readmit a suspended student, but the student has graduated before the appeal of the court's decision is heard. An order which has been vacated is no longer legally binding, but the opinion may still be cited as evidence of the court's legal reasoning.

vacated on other grounds, reversed on other grounds -- The lower court's order is no longer legally binding, but the decision on appeal does not affect the legal reasoning in the portion of the decision which has been cited.

cert. denied -- The Supreme Court "denied certiorari" -- i.e., it has declined to review the case, and it is expressing no opinion concerning the lower court decision, which remains standing.

Accord -- The case directly supports the preceding statement in the text, although the facts are different.

See -- The case supports the preceding statement in the text, although this conclusion must be reached through examination of the opinion and is not explicitly stated in so many words.

Cf. -- The case supports a statement, opinion, or conclusion of law different from that in the text but sufficiently analogous to lend some support to the statement in the text.

[Case cited without any introductory signal] -- The case directly supports the preceding statement in the text.

Contra -- The case directly contradicts the preceding statement in the text.

But see -- The case strongly suggests a contrary proposition from the preceding statement in the text.

But cf. -- The case supports a proposition which, while not directly contradictory to the preceding statement in the text, is sufficiently analogous to suggest a contrary conclusion.

The Effect and Weight of Court Decisions

Only the decisions of courts which have jurisdiction in a particular geographical area represent the clear judicial interpretation of the law for that area. Thus, for example, schools in Boston are obligated to follow the law as interpreted by the United States Supreme Court, the United States Court of Appeals for the First Circuit, the United States District Court of the District of Massachusetts, and the various relevant state courts. Nevertheless, the decisions of courts in other jurisdictions are relevant in that they will generally be given some weight by courts in your jurisdiction, and they serve as indications of judicial reasoning.

It must be emphasized that, in theory at least, courts do not "make" law. Congress and the state legislatures make laws. The courts only "interpret" what the law means. Of course, where very general constitutional provisions are involved (such as the Equal Protection Clause, which simply says that no state shall "deny to any person within its jurisdiction the equal protection of the laws"), there is a great deal of room for interpretation. Nevertheless, because courts do not make laws but only interpret them, the fact that no court has decided that a particular law gives a student a particular right does not mean that the student does not have that right.

References to Statutes and Regulations

Federal Statutes -- "U.S.C."

42 U.S.C. §2000d (Title VI of the 1964 Civil Rights Act) -- A "statute" is a law passed by Congress or a state legislature.

The statute here is Section 2000d of Title 42 of the United States Code. The United States Code is the permanent system for maintaining federal statutes, and it can be found in bound volumes in law libraries. The words in parentheses refer to the commonly used name of the legislation enacted by Congress.

Federal Regulations -- "C.F.R." or "Fed. Reg."

45 C.F.R. §86.40 -- Title 45, Section 86.40 of the Code of Federal Regulations, which is the permanent system for maintaining the regulations issued by various federal agencies and departments in compliance with congressional statutes. The regulations are legally binding unless and until someone demonstrates to a court that the regulations go beyond what the statute authorizes.

40 Fed. Reg. 18998 (June 20, 1975) -- Page 18998 of volume 40 of the Federal Register. The Federal Register is issued daily and contains newly issued federal regulations when proposed, changed, or finally adopted (along with other material issued by federal agencies and departments). Those that are finally adopted are later entered in the Code of Federal Regulations as well (see above).

State Statutes and Regulations

States have similar methods for reporting statutes passed by the state legislature and regulations issued by state agencies. (For a variety of examples, see §IV.G, "Privileged Communications.")

I. FREEDOM OF EXPRESSION

A. GENERAL PRINCIPLES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
United States Constitution, Amendment I

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for 50 years.

* * *

"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as close-circuited recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

* * *

". . .But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."

United States Supreme Court in
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 511, 512 (1969).

"But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, or its content."

Police Department of City of Chicago v. Mosley, 409 U.S. 92, 95 (1972).

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of schools."

Shelton v. Tucker, 364 U.S. 479, 487 (1960).

See also:

Grayned v. City of Rockford, 408 U.S. 104 (1972);
Healy v. James, 408 U.S. 169 (1972);
Papish v. Board of Curators, 410 U.S. 667 (1973);
Widmar v. Vincent, 102 S.Ct. 269 (1981).

Basic First Amendment doctrine, as set out in the cases above and in other Supreme Court decisions, starts with the fact that government may not interfere with expression because of what is said ("its message, its ideas, or its content"). This basic principle is qualified only by certain narrowly defined exceptions for obscenity, defamation, "fighting words" or "incitement," certain criminal activities involving speech (e.g., extortion), and (perhaps) invasion of privacy, which are not considered protected expression. (See §I.A.1.)

Government may, however, regulate conduct which accompanies expression or through which the expression takes place if such regulation or interference is sufficiently necessary to protect an important or compelling government interest which cannot be protected in any other way. Carrying on the educational process without substantial disruption is such an interest. Thus, as Tinker indicates, the "disruption" standard actually applies only to the conduct of the expressors -- "time, place, or type of behavior" -- and not to the content, nor to the reactions of others. (See §I.A.2.)

Any regulation of student expression must be based on clear and precise rules narrowly drawn to avoid any unnecessary interference with expression. (See §I.A.3.)

Even where expression can be restricted, it generally cannot be prohibited or censored before the fact. Where prior restraint is permissable at all, it requires carefully drawn procedures. (See §I.A.4.)

The forms of expression which are protected under these principles include speech, symbolic expression (e.g., buttons), press (publishing and distributing literature), assembly, association (forming organizations and related activities), petition, and freedom of conscience (e.g., freedom against being forced to participate in pledges of allegiance). (See §I.B.)

The First Amendment is most relevant to school discipline issues in two ways. First, many disciplinary incidents involve student-staff verbal interactions, and, while little of the First Amendment case law has arisen from such incidents, First Amendment principles are nevertheless relevant. (See §I.B.1, "Speech;" §I.A.1.a on "four-letter words;" and §I.A.2 on "disruption.") Second, students, parents, and advocates working on school discipline issues by speaking out, handing out literature, organizing other people, etc. are protected by the First Amendment (see §I.B generally), and retaliation for exercising these rights, often feared by students and parents, is illegal. (See §I.C.)

1. RESTRICTIONS ON CONTENT

The basic rule is that schools cannot interfere with expression because of what is said: "But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, or its content." Police Department of City of Chicago v. Mosley, 409 U.S. 92, 95 (1972). (See §I.A.)

There are, however, certain forms of communication which are not considered "protected expression" and which can thus be prohibited by schools, provided that they are precisely and correctly defined. These are limited to obscenity, defamation, "fighting words" or "incitement," certain forms of criminal conduct which involve speech (assault and battery, extortion, etc.), and (perhaps) invasion of privacy. All other communication is protected and can be subjected only to certain narrow time, place and manner regulation. (See §I.A.2.) Students who have challenged school restrictions based on the content of their expression have won in the large majority of cases, with courts holding that the particular expression restricted by the school did not meet the legal definition of obscenity, etc.

Any school rule which does regulate obscenity, defamation, etc., must be sufficiently precise in pointing out exactly what is prohibited to avoid being unconstitutionally vague or overbroad. See cases cited under obscenity and defamation below, many of which repeat this requirement; as well as Leibner v. Sharbaugh, 429 F.Supp. 744, 748 (E.D Va. 1977). See also §I.A.3, "Clear and Precise Regulations." But see Frasca v. Andrews, 463 F.Supp. 1043, 1049-50 (E.D.N.Y. 1979). [Note, however, that in some cases, setting out the legal definitions of obscenity or libel (found below) together with a list of examples may be sufficient. Ward v. Illinois, 431 U.S. 767 (1977).] In making this point, the court in Baughman v. Freienmuth, 478 F.2d 1345, 1350-51 (45h Cir. 1973), stated:

> The use of terms of art such as "libelous" and "obscene" are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria. Indeed, such terms are troublesome to lawyers and judges. None other than a Justice of the Supreme Court has confessed that obscenity "may be indefinable." Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.3d 793 (1964) (Stewart J., concurring). "Libelous" is another legal term of art which is quite difficult to apply to a given set of words. Moreover, that words are libelous is not the end of the inquiry: libel is often privileged. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).
>
> Thus while school authorities may ban obscenity and unprivileged libelous material there is an intolerable danger, in the context of prior restraint, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or

offensive. That they may not do.

Accord, Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

Even where expression is legally obscene, defamatory, etc., it cannot be restricted by prior censorship (as opposed to subsequent punishment), except under the terms discussed in §I.A.4. below. Further, it is doubtful that prior restraint can ever be used to prevent defamation. See:

Near v. Minnesota, 283 U.S. 697 (1931);
Bright v. Los Angeles Unified High School District, 124 Cal.Rptr. 598, 602-03 (Ct.App., 2nd Dist., 1975);
St. Ledger v. McKown, C.A. No. C-173,284 (Cal. Super.Ct., L.A. County, Oct. 19, 1976).

a. OBSCENITY (VERSUS "FOUR-LETTER WORDS")

Much of the substantive law on obscenity is found in Miller v. California, 413 U.S. 15 (1973); Ginsburg v. New York, 390 U.S. 629 (1968). Under the present standard, material is obscene only if it meets each of three tests:

(1) "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest"[of minors] [i.e., it stimulates lust]; and
(2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law" [for minors]; and
(3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" [for minors].

Miller, supra, at 24, as modified for minors under Ginsburg, supra. The Court also emphasized that it was focusing on "public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain" and "commercial exploitation of obscene materal." Id. at 35, 36.* See State v. Luck, 353 So.2d 225, 232 (La. 1977).

Application of these standards to the school context can be found in:

Papish v. Board of Curators, 410 U.S. 667, 669-70 (1973);
Scoville v. Board of Education, 425 F.2d 10, 14 (7th Cir.), cert. denied, 400 U.S. 826 (1970);
Fujishima v. Board of Education, 460 F.2d 1355, 1359 n.7 (7th Cir. 1972);
Shanley v. Northeast Independent School District, 462 F.2d 960, 971 (5th Cir. 1972);
Bazaar v. Fortune, 476 F.2d 570, 573 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974);
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973);
Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973);
Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass. 1970);
Koppell v. Levine, 347 F.Supp. 456, 458-59 (E.D.N.Y. 1972);
Jacobs v. Board of School Commissioners, 349 F.Supp. 605, 610-11 (S.D.Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975);
Vail v. Board of Education, 354 F.Supp. 592, 599 (D.N.H.), remanded for additional relief, 502 F.2d 1159 (1st Cir. 1973);

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*The Supreme Court issued a decision at press time applying a modified Miller standard to distribution of materials depicting children in live sexual performances. New York v. Ferber, ____S.Ct.____, 50 U.S.L.W. 5077 (7/2/82).

Beyer v. Kinzler, 383 F.Supp. 1164 (E.D.N.Y. 1974);
Right to Read Defense Committee of Chelsea v. School Committee of Chelsea 454 F.Supp. 703 (D.Mass. 1978);
Frasca v. Andrews, 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979);
Salvail v. Nashua Board of Education, 469 F.Supp. 1269 (D.N.H. 1979);
Reineke v. Cobb County School District, 484 F.Supp. 1252, 1258, 1262-63 (N.D.Ga. 1980);
de Groat v. Newark Unified School District, 133 Cal.Rptr. 225 (Ct.App. 1976);
Connecticut v. Anonymous, 34 Conn.Supp. 575 (Super.Ct. 1977);
Opinion of the Justices, 337 A.2d 777 (N.H. 1975);
Graham v. Hill, 444 F.Supp. 584 (W.D.Tex. 1978) (child pornography statute deemed overbroad by constitutional standards and *Miller*, *supra*, by not requiring that pictures be obscene);
Sheck v. Baileyville School Committee, 530 F.Supp. 679 (D.Me. 1982).
Cf.: *Cohen v. California*, 493 U.S. 15 (1971) (right to wear in courthouse a jacket bearing slogan "Fuck the Draft").

In particular, as has been noted by the Supreme Court in *Papish* and reiterated by these lower courts, student expression which uses offensive, profane or vulgar words and expressions does not constitute obscenity; nor do sexual depictions when used to make a point or communicate ideas or information. Under certain circumstances, however, profanities or "four-letter" words, although not obscene, may be punishable as "fighting words." (See §I.A.1.d.)

Certain recent cases indicate a possible erosion of these principles:

F.C.C. v. Pacifica, 434 U.S. 1008 (1979) (FCC may restrict hours for radio broadcast of monologue using steady stream of four-letter words, even though not obscene, because of potential impact on large audience of children during day-time hours combined with the nature of radio and television broadcasting and its power to invade the privacy of the home; ruling not applicable to other programs which make more occasional use of such words);
Trachtman v. Anker, 563 F.2d 412 (2nd Cir. 1977), *cert. denied*, 435 U.S. 925 (1978)(school may prohibit distribution to students of questionnaire concerning sexual attitudes because of demonstrated potential for psychological damage).

Compare:

Gambino v. Fairfax County School Board, 429 F.Supp. 731 (E.D.Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977)(student newspaper right to publish article on student use of contraceptives);
Reineke v. Cobb County School District, *supra* (student newspaper right to publish article on teacher attitudes toward homosexual teachers, as well as use of the word "damn");
Right to Read Defense Commitee of Chelsea v. School Committee, *supra*, 454 F.Supp. at 715 n. 20 (*F.C.C. v. Pacifica Foundation* not applicable because of unique potential of broadcasting to invade home);

Salvail v. Nashua Board of Education, supra, 469 F.Supp. at 1274 (same);

Sheck v. Baileyville School Committee, supra, 530 F.Supp. at 687-88 ("The social value of the conceptual and emotive content of censored expression is not to be sacrificed to arbitrary official standards of vocabular taste without constitutional recourse ... As long as words convey ideas, federal courts must remain on first-amendment alert in book-banning cases, even those ostensibly based strictly on vocabular consideration. A less vigilant rule would leave the care of the flock to the fox that is only after their feathers.");

de Groat v. Newark Unified School District, supra, (no evidence that poetry reading devoted largely to "scatological and sexual material" had adverse effect on any student);

All other cases cited above.

See also:

Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2181 (1981) (reaffirming that expression including entertaimnent cannot be prohibited solely because it displays nudity; non-school case);

Brown v. State, 358 So.2d 16 (Fla. 1978) (striking down state's "open profanity" statute).

As Right to Read Defense Committee and Salvail indicate, Pacifica should be distinguished under the general rule that broadcasting is subject to less First Amendment protection and a greater degree of government regulation than other forms of expression. See also F.C.C. v. National Citizens Committee for Broadcasting, 98 S.Ct. 2096 (1978). For analysis and criticism of Pacifica, see Lawrence Tribe, American Constitutional Law (1978), 1979 Supplement at 61-68, which concludes, "Pacifica should be confined to its facts, and eventually discarded as a 'derelict in the stream of the law,'" citing North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156 (1973).

For further discussion of student use of "four-letter" words, see also §1.A.1.d on fighting words and incitement and §I.B.1 on speech and within-classroom expression.

b. DEFAMATION (VERSUS CRITICISM OF SCHOOL OFFICIALS)

Libel is written defamation. Slander is spoken defamation. Much of the substantive law on defamation is found in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). See also Time, Inc. v. Pape, 401 U.S. 279 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

In order to be defamatory, a statement concerning matters of public interest about public officials -- including school officials -- or about public figures, such as celebrities, must meet each of three tests:

(1) it must be false; and
(2) it must cause actual injury to the person's reputation (although in some states certain statements, if made to other persons, are presumed injurious without more, such as accusations of certain moral crimes); and
(3) it must be "made with 'actual malice' -- that is with knowledge that it was false or with reckless disregard of whether it was false or not."

New York Times, supra, 376 U.S. at 279-80. In the absence of this third factor,

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . .Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."

Id. at 272-73. And, in the absence of all three factors, the statement's falsity is not enough, for "erroneous statement is inevitable in free debate, and. . .it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" Id. at 271-72. See Edwards v. National Audobon Society, Inc., 556 F.2d 113, 120 (2nd Cir. 1977), cert. denied, 434 U.S. 1002 (1977) ("We do not believe that the press may be required under the First Amendment to suppress newsworthy statements [made by others] merely because it has serious doubts regarding their truth. . .if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.").

Where the statement is about private individuals, or about the private lives of public officials or public figures where unrelated to their public conduct -- as opposed to matters of public interest -- states are free to set their own standards for damage to reputation, "so long as they do not impose liability without fault." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). In most states, negligence, and not "actual malice," is required.

These tests have been applied to students' expression in:

Shanley v. Northeast Independent School District, 462 F.2d 960, 972 n.10 (5th Cir. 1972);
Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973);
Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975);
Frasca v. Andrews, 463 F.Supp. 1043, 1052 (E.D.N.Y. 1979);
Reineke v. Cobb County School District, 484 F.Supp. 1252, 1258, 1259, 1260, 1263 (N.D.Ga. 1980);
Bright v. Los Angeles Unified High School District, 124 Cal. Rptr. 598, 604 (Ct.App., 2nd Dist., 1975);
Johnson v. Board of Junior College District No. 508, 334 N.E.2d 442 (Ill.Dist.Ct.App. 1975);
Scelfo v. Rutgers University, 116 N.J.Super. 403, 282 A.2d 445 (1971);
Endress v. Brookdale Community College, No. C-1808-74 (N.J. Super.Ct., Monmouth County, Apr. 30, 1975), aff'd No. 2879-74 (N.J.Super.Ct., App.Div., Aug. 27, 1976) (teacher expression);
Wallace v. Weiss, 372 N.Y.S.2d 416 (Sup.Ct. 1975).

In particular, harsh criticism of school officials, like other public officials, is not by itself defamation.

For cases dealing with other aspects of defamation, see:

Frasca, supra (student government president not a public figure, dictum);
Reineke, supra, 484 F.Supp. at 1259 (article critical of student government president protected; Frasca distinguished);
Dobrovolny v. Long, C.A. No. 24149 (D.Ia., Crawford County, Aug. 22, 1975) (Clearinghouse No. 20,626) (school superintendent both a public figure and a public officer);
Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D.Mich. 1978) (negative statements made by administrators about student senate president not libelous because statements related to student's involvement in public issues of great local concern, and there was no proof of malice and no proof of special damages);

Melton v. Bow, 247 S.E.2d 100 (Ga. 1978) (teacher found liable for accusing former students of theft);

McGowen v. Prentice, 341 So.2d 55 (La.App. 1976) (informal statement of principal to teacher, in reference to that teacher and a second teacher, ". . .that's why you understand her so well, because you all are both nuts" not defamatory);

Deaton v. Delta Publishing Co., 326 So.2d 471 (Miss. Sup.Ct. 1976) (children's invasion of privacy suit against publishing company; students are not public figures);

Arcand v. Evening Call Publishing Co., 567 F.2d 1163 (1st Cir. 1977) (although a civil action will lie if a defamatory statement is made which applies to all members of a small group, defamation of a large group gives no right of action to an individual member absent showing that the individual was a target of defamatory material).

c. INVASION OF PRIVACY

Certain forms of expression may not be protected by the First Amendment if they constitute an invasion of privacy, but the case law is not clear.

Many states permit people to sue for "invasion of privacy," one form of which deals with public disclosure of highly personal facts about an individual. Unlike defamation, there is no requirement that the statement be false or made with malice. Generally, it must be proved that the material (1) is about intimate or embarrassing matters of one's personal life, (2) is not newsworthy, (3) has been published without consent, and (4) identifies the person. See, e.g.:

Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (article about champion body surfer's unusual hobbies deemed newsworthy, as distinct from "morbid and sensational prying into private lives for its own sake");
Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1969);
Deaton v. Delta Publishing Co., 326 So.2d 471 (Miss. 1976).

The Supreme Court has thus far not decided the question of whether the First Amendment forbids restrictions on the right to publish truthful information about very private matters unrelated to public affairs.

Time, Inc., v. Hill, 385 U.S. 374, 383 n.7 (1967);
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 488-97 (1975).

In *Cox*, the Court left the question open and instead ruled that, in any event, any such invasion of privacy suit cannot, under the First Amendment, be based upon publishing information which is already a matter of public record (here broadcasting of rape victim's name obtained from court records).

In *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652 (Md.Ct.Sp.App. 1979), college basketball players whose eligibility was being questioned sued the paper and the local paper for invasion of privacy for printing information about their academic records. The court denied relief, finding that the players had become "public figures" and the disclosures were of public interest, and that there was no offensive intrusion since the papers had not inspected confidential files or solicited someone to do so, but had been given the information gratuitously by an unnamed source. See *Reineke v. Cobb County School Board*, 484 F.Supp. 1252, 1259 (N.D.Ga. 1980), where the court held that a student newspaper article critical of student body president did not invade his rights.

Another form of "invasion of privacy" action involves the unauthorized use of one's name or aspects of personality for commercial gain, such as advertisements which use a person's picture or name without permission. The Supreme Court specifically upheld, over First Amendment objections, the right to bring such suits in Zacchini v. Scripps-Howard Broadcasting Co., 97 S.Ct. 2849 (1977) (no First Amendment right to broadcast on news report the entire act of a performer).

A third form of invasion of privacy relates not to what is published but to how it is obtained -- offensive, physical "intrusion" into private property. See:

Bilney, supra;
Frasca v. Andrews, 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979) (no invasion of privacy, under federal student records act, where information printed about student government president in high school newspaper was obtained from a source independent of school records).

For more on privacy issues, see §IV, "Right to Privacy."

d. FIGHTING WORDS/INCITEMENT (VERSUS CONTROVERSIAL OPINIONS) -- RESPONSIBILITY FOR THE REACTIONS OF OTHERS

"Fighting words" and "incitement" are the only exceptions to the general rule that students who express themselves are not responsible for the conduct -- disruptive or otherwise -- of other persons.

Fighting Words

"Fighting words" are words which, when addressed directly to the average person, are clearly and inherently likely to provoke violent retaliation.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942);
Street v. New York, 394 U.S. 576, 592 (1969);
Cohen v. California, 493 U.S. 15, 20 (1971);
Gooding v. Wilson, 405 U.S. 518 (1972);
Fenton v. Stear, 423 F.Supp. 767 (W.D.Pa. 1976);
Frasca v. Andrews, 463 F.Supp. 1043, 1050 (E.D.N.Y. 1979).
See: *Connecticut v. Anonymous*, 34 Conn.Supp. 575 (Super. Ct. 1977), (reversing conviction of high school student who gave "finger" to state trooper);
McCall v. Florida, 354 So.2d 869 (Fla. 1978);
Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978);
Village of Skokie v. National Socialist Party of America, 69 Ill.2d 605, 373 N.E.2d 21 (1978).

These cases make it clear that whether particular words are "fighting words" depends upon the specific context and manner in which they are said, and that words not directed at a specific person(s) can never be fighting words. In certain situations, racial epithets could be fighting words, as could profane language, or gestures, but only if these standards are met.

Incitement

Similarly, "incitement" is defined as the use of words which are *both* intended to incite *immediate* violation of laws or lawful regulations *and* are in fact likely to result in such violation: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).* In the school context, courts have consistently rejected attempts

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*This and many of the other principles set forth in this section have been strongly reaffirmed by a Supreme Court decision issued at press time. *N.A.A.C.P. v. Claiborne Hardware Co.*, _______S.Ct._______, 50 U.S. L.W. 5122 (7/2/82).

to restrict or punish students whose advocacy does not meet this definition of incitement:

Healy v. James, 408 U.S. 169, 188-90 (1972);
Brooks v. Auburn University, 412 F.2d 1171, 1173 (5th Cir. 1969);
Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976);
Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied, 98 S.Ct. 1276 (1978);
Stacy v. Williams, 306 F.Supp. 963, 973-74 (N.D.Miss. 1969), aff'd, 446 F.2d 1366 (5th Cir. 1971);
Undergraduate Student Association v. Peltason, 367 F.Supp. 1055 (N.D.Ill. 1973);
University of Missouri at Columbus-National Education Association v. Dalton, 456 F.Supp. 985 (W.D.Mo. 1978);
High Ol' Times v. Busbee, 456 F.Supp. 1035, 1040 (N.D.Ga. 1978);
Student Coalition for Gay Rights v. Austin Peay University, 477 F.Supp. 1267, 1272-74 (M.D.Tenn. 1979).

See: Scoville v. Board of Education, 425 F.2d 10, 14 (7th Cir. 1970);
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973);
Molpus v. Fortune, 311 F.Supp. 240 (N.D.Miss. 1970), aff'd, 432 F.2d 916 (5th Cir. 1970);
National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1014-17 (4th Cir. 1973)(non-student group);
Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978)(same);
Collin v. Smith, supra;
Hanover v. Northrup, 325 F.Supp. 170 (D.Conn. 1970);
Aryan v. Mackey, 462 F.Supp. 90 (N.D.Tex. 1978);
Reineke v. Cobb County School District, 484 F.Supp. 1252, 1260 (N.D.Ga. 1980).

Compare:
Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) (test met in context of three days of violent demonstrations).

The contemplation or discussion of illegal acts, as distinct from incitement, is protected. *

Bogart v. Unified School District No. 298, 432 F.Supp. 895, 905 (D.Kan. 1977)(teacher case).

See: Cyr v. Walls, 439 F.Supp. 697 (N.D.Tex. 1977)(police harrassment of homosexuals; "The mere propensity or desire of an individual to commit a criminal act does not permit state interference

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*N.A.A.C.P. v. Claiborne Hardware Co., supra.

> with that individual's freedom. The individual does not become a law violator until he commits an overt criminal act").

Further, it is doubtful that written words unassociated with other conduct can ever meet the "incitement" test. High Ol' Times, supra, 456 F.Supp. at 1040.

Provocative or Offensive Speech Distinguished

The definitions of fighting words and incitement are narrowly restricted because the First Amendment is designed to encourage, not discourage controversy: *

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. . . ."
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> Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969)

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute. . .is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."
>
> Terminiello v. Chicago, 337 U.S. 1, 4 (1949)

Thus, absent fighting words or incitement, students' expression cannot be restricted despite the fact that others may find the content abhorrent, offensive, or harshly critical.*

Papish v. Board of Curators, 410 U.S. 667 (1973);
Healy v. James, 408 U.S. 169, 187-88 (1972);
Scoville, supra;
Reineke, supra, 484 F.Supp. at 1259-60.
See also:
Cohen v. California, supra, (right to wear slogan, "Fuck the Draft," in courthouse);
Cases cited in discussion of obscenity (versus "four-letter" words) and defamation (versus criticism) above (§I.A.1.a and b);
Discussion of expression in the classroom (§I.B.1).

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*N.A.A.C.P. v. Claiborne Hardware Co., supra.

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Reactions of Others

Similarly, absent fighting words or incitement, student expression cannot be restricted or punished because of the reactions of other students or staff.

Shanley v. Northeast Independent School District, 462 F.2d 960, 974 (5th Cir. 1972);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340, 1342 (S.D.Tex. 1971), 333 F.Supp. 1149, 1153 (S.D.Tex. 1973);
Hanover v. Northrup, supra;
Jacobs v. Board of School Commissioners, 349 F.Supp. 605, 611 (S.D.Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973); vacated as moot, 420 U.S. 128 (1975) (a "rule may not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written materials");
Fricke v. Lynch, 491 F.Supp. 381, 385-88 (D.R.I. 1980) (male homosexual high school student could not be barred from bringing male escort to senior prom where school officials failed to show that other means of controlling possible hecklers were not available).

See: Collin v. Smith, supra;
Village of Skokie, supra.*
Cf: Lewis v. Delaware State College, 455 F.Supp. 239, 248 (D.Del. 1978).

But see:
Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977) (questionnaire concerning student sexual attitudes prohibited on grounds of potential for psychological injury);
Frasca v. Andrews, 463 F.Supp. 1043, 1050-52 (E.D.N.Y. 1979) (even after holding that letter to the editor in school newspaper did not constitute "fighting words," court upheld suppression because of evidence of potential disruption).

If other students or staff become disruptive, it is they who can be held responsible, and if a hostile group threatens to harm or interfere with the speaker or distributor, the school's first obligation is to stop them and protect the speaker or distributor. See Jones v. Board of Regents, 436 F.2d 618, 621 (9th Cir. 1970); Crews v. Clonc, 432 F.2d 1259, 1265 (7th Cir. 1972); Fricke, supra. Where such attempts to stop the hostile or disruptive reactors fail, it may then be necessary to stop the speaker or distributor, but not to punish him/her. See Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).

The fact that someone's expression undermines other people's support for government law or policy does not by itself create a basis for punishment under the "incitement" standard.* In Collin v. Smith, supra, 578 F.Supp. at 1205, for example, the court declared:

> The Village's third argument is that it has a policy of fair housing, which the dissemination of racially defamatory

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*N.A.A.C.P. v. Claiborne Hardware Co., supra.

> material could undercut. We reject this argument without extended discussion. That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights.

Similarly, in Hanover v. Northrup, supra, 325 F.Supp. at 173, the court said, "It does not matter whether some of her students, who also refrained from recitation of the Pledge, were persuaded to do so because of the plaintiff's conduct. 'The First Amendment protects successful dissent as well as ineffective protests;'" citing Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969).

See also the Supreme Court language quoted from Terminiello v. Chicago, supra.

Thus, the reactions of others cannot be the basis for labeling expression "disruptive." The question is, whose actions are actually disrupting the educational process? These principles concerning the reactions of others stem from the fundamental notion of individual responsibility for one's actions which is embodied in the First Amendment.* See Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976). See also comments to §1.B.5, "Assembly."

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*N.A.A.C.P. v. Claiborne Hardware Co., supra.

e. CRIMINAL CONDUCT INVOLVING SPEECH (ASSAULT AND BATTERY, EXTORTION, ETC.)

Certain forms of illegal acts are carried out in part through the use of words. Examples include assault and battery, bribery, and extortion. These crimes are defined by state laws. Provided that these acts are defined sufficiently narrowly under the principles above, the words used to carry them out are not protected speech and can be punishable. One instance of this is found in Williams v. Turner, 382 So.2d 1040, 1042 (La.App. 1980), where the court, referring to elementary school students' speech in their unsuccessful attempt to physically retaliate against teacher who had used corporal punishment, stated, "Conspiracy to commit a battery is not protected speech."

Of course, on the other hand, the state cannot make otherwise-protected expression punishable by enacting a criminal statute. Some of the most useful cases and principles for understanding this distinction are discussed in §I.A.1.d above, dealing with "fighting words" and incitement," as distinguished from advocacy, etc.

2. RESTRICTIONS ON TIME, PLACE, MANNER -- THE DISRUPTION STANDARD

"The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially intefer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. . . .

"Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512-13 (1969)

"Clearly then, freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential *on school premises* so long as it does not unreasonably interfere with normal school activities. Administration can properly regulate the times and places within the school building at which papers may be distributed. Obviously, the first amendment does not require that students be allowed to read newspapers during class periods. Nor should loud speeches or discussion be tolerated in the halls during class time. A proper regulation as to 'place' might reasonably prohibit all discussion in the school library. Administration may not, however, apply regulations as to 'time' or 'place' or 'manner' in a discriminatory fashion."

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340 (S.D.Tex. 1969)(emphasis in original)

Under Supreme Court doctrine, in regulating or restricting time, place, or type of expressive conduct, the school can only use means which:

(a) are rationally related to furthering an important or compelling governmental interest (e.g., protection against substantial disruption); and
(b) are neutral and unrelated to the content and subject matter of the expression; and
(c) are narrowly drawn so that they result in no greater restriction of expression than is actually necessary to serve that interest -- if there is a reasonable way to avoid substantial disruption without interfering with expression, it must be used instead.

Healy v. James, 408 U.S. 169, 189 n.20 (1972);
Grayned v. City of Rockford, 408 U.S. 104, 115-19 (1972);
United States v. O'Brien, 391 U.S. 367, 377 (1968);
Elrod v. Burns, 427 U.S. 347 (1976);
Gay Students Organization v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974);
Familias Unidas v. Briscoe, 619 F.2d 391, 399 (5th Cir. 1980);
New Left Education Project v. Board of Regents, 326 F.Supp. 158, 163-64 (W.D.Tex. 1970), vacated on other grounds, 404 U.S. 541 (1972), 414 U.S. 807 (1973);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 848 (S.D.Cal. 1976);
Solid Rock Foundation v. Ohio University, 478 F.Supp. 96, 101-102 (S.D.Ohio 1979);
Fricke v. Lynch, 491 F.Supp. 381, 385-88 (D.N.H. 1980).

Thus, even though the school may establish "reasonable" regulations concerning time, place, and manner of expression, "reasonableness" is determined by the above test. See, for instance, Solid Rock Foundation, supra, 478 F.Supp. at 101, a school literature distribution case:

> To declare the test as one of "reasonableness" does not permit the Court to abandon its duty to ascertain whether competing interests are compelling. The Supreme Court has stated that the First Amendment permits only those time, manner, and place regulations that are "necessary to further significant governmental interests." Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972). A regulation is unreasonable when its incidental restriction on First Amendment freedoms is no [sic] greater than is essential to the furtherance of an important or substantial state interest. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

In these terms, regulations which limit distribution of literature, speeches, etc. to outside the school building or before and after school hours cannot be justified. See:

Riseman v. School Committee of Quincy, 439 F.2d 148, 149 n.2 (1st Cir. 1971);
Jacobs v. Board of School Commissioners, 490 F.2d 601, 604, 609 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975);
Fujishima v. Board of Education, 460 F.2d 1355, 1359 (7th Cir. 1972);
Sullivan v. Houston Independent School District, supra;
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H. 1973), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973).

In Riseman, for example, the court struck down a regulation limiting distribution to outside the building, pointing out that there were many places within the building where non-disruptive distribution could occur. Jacobs struck down a regulation which limited distribution to times when classes were not in session, pointing out that while some students are in class, others have free periods and literature distribution among the latter may not be restricted. Accord, Riseman.

Thus, the fact that one time or place is available does not permit the school to forbid expression at other non-disruptive times and places. See also:

Schneider v. New Jersey, 308 U.S. 147 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place");
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975);
Minarcini v. Strangsville City School District, 541 F.2d 577, 582 (6th Cir. 1976);
Pratt v. Independent School District No. 831, Forest Lake, 670 F.2d 771, 779 (8th Cir. 1982);
Salvail v. Nashua Board of Education, 469 F.Supp. 1269, 1275 (D.N.H. 1979).

Compare:
Brush v. Pennsylvania State University, 414 A.2d 48 (Pa. 1980) (permissable on privacy grounds to bar canvassing in living areas of dormitory by majority vote of residents where these living areas were equivalent to interior of private home and canvassing was still permitted in lobbies, dining hall buildings, by posting on bulletin boards and in mailboxes, and by individual invitation into students' rooms).

On the other hand, courts have noted that time, place, and manner restrictions must, in addition to meeting the other requirements above, also "leave open ample alternative channels for communication of the information."

Virginia State Board of Pharmacies v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976);
Heffron v. International Society for Krishna Consciousness, 101 S.Ct. 2559 (1981).

The cases above also make it clear that the *burden is on the school to justify its interference* by showing that these standards have been met. There must be real, factual evidence, for "undifferentiated fear or apprehension of disturbance is not enough." *Tinker*, *supra*, at 508. See, for example, *Aryan v. Mackey*, 462 F.Supp. 90, 93-94 (N.D.Tex. 1978), where the court carefully analyzed and rejected the school's argument that the wearing of masks by anti-Shah demonstrators would be reasonably likely to cause them to become violent.

As one court has noted:

> *Tinker* and its progeny teach us that the court must focus on actual, not potential or hypothetical, disruption. We have no doubt that the proper functioning of schools and universities requires some discretion from all involved, but unrealistic sensitivity to the fragility of schools and universities is inappropriate. . .The court must closely examine the asserted disturbing activity to insure that the reasons advanced meet the "substantial and material" disruption standard. . . .
>
> Mabey, at least momentarily, did disrupt the senate meeting. The question is the severity of the disruption. [*Mabey v. Reagan*, 537 F.2d 1036, 1050 (9th Cir. 1976).]

See also:

Shamloo v. Mississippi State Board of Trustees, 620 F.2d 516, 522 (5th Cir. 1980) (lower court conclusion that student demonstration was disruptive held to be insufficient because the lower court had failed to find that the demonstration was a "*material and substantial*" disruption of classwork, disorder or invasion of the rights of others);

Fricke v. Lynch, *supra* (court carefully scrutinized and rejected the school's arguments concerning the potentially disruptive reaction to a male student's bringing another male to the senior prom, finding that other measures were available and that "any disturbance here, however great, would not interfere with the main business of the school -- education . . . classes or schoolwork").

The standard for disruption of the educational process will often depend on the definition of the "educational process." An overly controlled school environment, where maintaining order depends upon silencing virtually all expression, is inconsistent with the freedoms protected by the First Amendment.

What If Other Students Might Become Disruptive?

The disruption standard applies to the actions of the individual engaged in expression. Expression cannot be restricted because of the disruptive reactions of others unless the person is using "fighting words" or "incitement," properly defined. See §I.A.1.d above on the "Reactions of Others."

Defining Disruption

Even though "substantial and material disruption" is the constitutional standard, a school rule which simply forbids such disruption without defining it more specifically will generally be struck down as vague. Thus, in *Jacobs v. Board of School Commissioners*, 490 F.2d 601, 605 (7th Cir. 1973) *vacated as moot*, 420 U.S. 128 (1975), the court noted,

> Defendants argue unpersuasively that proviso 1.1.1.3 is not over-vague because of its similarity to the text of the standard by which the Supreme Court tested a precise regulation against wearing armbands in Tinker v. Des Moines School District, 393 U.S. 503, 514, 89 S.Ct. 733, 21 L.Ed.2d 731. It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.

The court pointed out that the meaning of such terms as "disruption," "significant," and "normal educational processes" is far from clear, particularly when measured against the constitutional need to avoid vague or overbroad regulation of rights of free expression. Accord, *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975) (retired Supreme Court Justice Clark). Similar regulations which used *Tinker*-like language were struck down in:

- *Soglin v. Kauffman*, 295 F.Supp. 978, 991-94 (W.D.Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969);
- *Corp. of Haverford College v. Reeher*, 329 F.Supp. 1196, 1209-10, 1213 (E.D.Pa. 1971);
- *Rasche v. Board of Trustees*, 353 F.Supp. 973 (N.D.Ill. 1972);
- *Undergraduate Student Association v. Peltason*, 367 F.Supp. 1055 (N.D.Ill. 1973);
- *Marin v. University of Puerto Rico*, 377 F.Supp. 613, 627 (D.P.R. 1974);
- *Smith v. Sheeter*, 402 F.Supp. 624 (S.D.Ohio 1975);
- *Pliscou v. Holtville Unified School District*, 411 F.Supp. 842, 850-51 (S.D.Cal. 1976);
- *Hall v. Board of School Commissioners*, 469 F.Supp. 697, 709 (S.D.Ala. 1980).

But see:

- *Furumoto v. Lyman*, 362 F.Supp. 1267, 1282-84 (N.D.Cal. 1973);
- *Commonwealth v. Bohmer*, 372 N.E.2d 1381 (Mass. 1978).

See also:

- Cases and Discussion in §V.B., "Vague Rules."

In large measure, substantial disruption can be defined in relation to the more specific, narrowly drawn time, place, and manner regulations for specific forms of expression.

3. CLEAR AND PRECISE REGULATIONS

"...These freedoms are delicate and vulnerable, as well as extremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions...Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. * * * Precision of regulation must be the touchstone in an area so closely touching upon our most precious freedoms."

N.A.A.C.P. v. Button, 371 U.S. 415, 433, 438 (1963).

In order to avoid violations of constitutional rights, precision in school rules affecting expression is essential. Rules which are vague -- in that they fail to sufficiently define what conduct is or is not prohibited -- and rules which are overbroad -- in that they could be applied to prohibit protected as well as unprotected expression -- are unconstitutional.

Vagueness and overbreadth are discussed, together with case citations, in §V. Note that rules are much more likely to be struck down as vague where they restrict expression. See also §I.A.2 on the need for precise definition of "substantial and material disruption," §I.A.1 on the need to define such terms as "obscenity" and "defamation," and §I.A.4 on the need for precise regulations wherever prior restraint is permitted.

4. PRIOR RESTRAINT

"Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books, Inc. v. Sullivan, 372 U.S. [58, 70 (1963)]. . .; New York Times Co. v. United States, 403 U.S. [713, 714 (1971)]. . .; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419. . .(1971); Carroll v. Princess Anne, 393 U.S. 175, 181. . .(1968); Near v. Minnesota ex. rel. Olson, 283 U.S. [697, 716 (1931)]. . .The presumption against prior restrainsts is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).

Accord:

Healy v. James, 408 U.S. 415, 419 (1971) (school case);

Nebraska Press Association v. Stuart, 96 S.Ct. 2791, 2802 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights");

Carroll, supra ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgments");

Vance v. Universal Amusement Co., Inc., 100 S.Ct. 1156, 1161 (1980).

Several of the reasons for the presumption against prior restraints, even when accompanied by extensive procedural safeguards, are summarized the the Center for Law and Education's Constitutional Rights of Students, 66 (1976):

> In conclusion, a system of prior review of content creates a great risk of improper suppression . . . Robust expression at the periphery of the zone of protection is not often favored. Shanley [v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972), declining to rule prior review unconstitutional per se but finding that the school had failed to follow the careful procedural safeguards required for its use] is illustrative. There the "controversial" statements advocated a review of marijuana laws and offered information on birth control. A Presidential Commission had made the same recommendation on marijuana laws and many materials in the school's library dealt with birth control. The court described the system's concern as "odd." 462 F.2d at 972. Also it characterized two of its legal points as "a constitutional tossil, exhumed" and involving remarkable reliance on the conditional verb

> "could." 462 F.2d at 967, 975. What could this system do even with a perfect rule? More significantly, how many students will not take the initial risk of submitting material or be unable to overturn an adverse decision because of unawareness of their rights or lack of resources?

Further, even a carefully framed system of prior review is frequently likely to result in some delay. Effective exercise of freedom of expression often depends upon the ability to get opinions across at the most timely moment; spontaneity can also be a crucial element.

If the heavy presumption against prior restraint is given proper weight, it is difficult to see how any prior review scheme in a school can be sufficiently justified. On the one hand, prior review is not necessary to prevent substantially disruptive activity. This can be accomplished through reasonable regulations concerning time, place, and manner of expression. On the other hand, any regulation, before or after expression, of the content of expression is forbidden altogether, except for certain, narrowly limited forms of unprotected expression: obscenity, defamation, and "fighting words" or "incitement." There is little compelling evidence of the necessity for the regulation of obscenity to take the form of prior restraint, and prior censorship of defamatory materials may well be illegal altogether. See:

Near v. Minnesota, supra;
Bright v. Los Angeles Unified High School District, 124 Cal.Rptr. 598, 602-03 (Ct.App., 2nd Dist., 1975);
St. Ledger v. McKown, C.A. No. C-173,684 (Ca.Super.Ct., L.A. County, Oct. 19, 1976).

As for fighting words, the determination depends upon the very specific moment when the statement is made and upon whether it is aimed at specific individuals with the prupose of immediately provoking them to violence. Prior review is a particularly poor tool for making this determination.

One court demonstrated the weight of the school's burden by comparing it with the burden which the Supreme Court found the federal government had failed to meet in New York Times Co. v. United States, 403 U.S. 713 (1971):

> If the significant interests of national security, protection of diplomatic confidences, and safe-guarding soldiers lives, invoked in New York Times, were not adequate justification for the prior restraint of the rights of a free press to publish a broad range of materials (the so-called Pentagon Papers), the revelation of some of which even members of the majority thought would do "substantial damage" to those interests, id at 731, 91 S.Ct. 2140, then it

> is difficult to perceive how the need for traffic control, space allocation, and minimization of noise and other disruptions of university activities can be adequate justifications for a prior restraint on demonstrations of all kinds everywhere within the University. [Marin v. University of Puerto Rico, 377 F.Supp. 613, 625 (1974)]

Compare U.S. v. Progressive, Inc., 467 F.Supp. 990 (W.D. Wis), dismissed, 610 F.2d 819 (7th Cir. 1979)(preliminary injunction granted against publication of article containing technical details on construction of hydrogen bomb).

Prior review is especially disfavored when it results in censorship of criticism of government actions by officials associated with those actions. See Nebraska Press Association v. Stuart, 96 S.Ct. 2791, 2824n. 33 (1976)(J. Brennan, concurring). Thus, there are added dangers when a prior approval scheme puts school officials in the position of censoring student expression which may be critical of school policy.

Courts have ruled school prior restraint schemes impermissable outright in:

Riseman v. School Committee of Quincy, 439 F.2d 148, 149n.2 (1st Cir. 1971);
Fujishima v. Board of Education, 460 F.2d 1355, 1357 (7th Cir. 1972);
Hammond v. South Carolina State College, 272 F.Supp. 947, 950 (D.S.C. 1967);
Jacobs v. Board of School Commissioners, 348 F.Supp. 605, 609-10 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975).

See Bright, supra, 124 Cal.Rptr. at 603 (school prior restraint "at the very least...questionable" under state and federal constitutions).

Courts which have declined to rule all prior restraint in schools to be illegal per se have nevertheless regularly struck down the particular prior restraint schemes in question because they failed to provide carefully drawn procedural safeguards as required by the Supreme Court. Thus, in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, the Court stated,

> In Freedman [v. Maryland, 380 U.S. 51 (1965)], the Court struck down a state scheme for the licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S., at 58....We held in

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> Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo [i.e., procedures must specify "that the censor will, within a specified brief period, either issue a license or go to court," Freedman, 380 U.S. at 59]. Third, a prompt final judicial determination must be assured.

See: Bantam Books, supra, 393 U.S. at 70;
Carroll, supra, 393 U.S. at 181;
Snyder v. Board of Trustees of University of Illinois, 286 F.Supp. 927, 934, 936 (N.D. Ill. 1968);
Antonelli v. Hammond, 308 F.Supp. 1329, 1325 (D. Mass. 1970).

Further, the procedures must spell out the legally valid precise criteria by which the censor will decide whether the material is protected. See:

Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1971);
Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973);
Wilson v. Chancellor, 418 F.Supp. 1358, 1364 (D. Ore. 1976).
See: Hall v. Board of School Commissioners, 496 F.Supp. 697, 709 (S.D.Ala. 1980).

Application of these procedural requirements to specific forms of student expression is discussed in each part of §I.B.

For further commentary on prior restraints, see:

Center for Law and Education, The Constitutional Rights of Students, 62-66, 89-90 (1976);
"Note, Prior Restraints in Public High Schools," 82 Yale L.J. 1325 (1973).

5. INCONSISTENT APPLICATION

Differences in treatment of the expression of different students or groups may violate the Equal Protection Clause as well as the First Amendment. Further, several courts, in overturning school action which restricted student or teacher expression (particularly "four-letter" words), have pointed to the fact that the school's textbooks or library books contained similar or identical language. See:

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969):
Scoville v. Board of Education, 425 F.2d 10, 14 (7th Cir.), cert. denied, 400 U.S. 826 (1970);
Vought v. Van Buren Public Schools, 306 F.Supp. 1388 (E.D. Mich. 1969);
Channing Club v. Board of Regents, 317 F.Supp. 688 (N.D.Tex. 1970);
Salvail v. Nashua Board of Education, 469 F.Supp. 1269, 1274 (D.N.H. 1979).

See also:
Solid Rock Foundation v. Ohio State University, 478 F.Supp. 96 (S.D. Ohio 1979) (overturning policy which restricted distribution of off-campus publications to 16 locations on campus while allowing official student newspaper to be distributed at 145 places);
Hall v. Board of School Commissioners, 496 F.Supp. 697, 709-10 (S.D.Ala. 1980) (literature distribution policies administered in an arbitrary and inconsistent manner);
McClung v. Board of Education, 346 N.E.2d 691 (Ohio 1976) (punishment for violation of grooming regulations overturned, in part because of inconsistent application);
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972);
Carey v. Brown, 100 S.Ct. 2286 (1980).

See also comments to §I.B.3, "Access to School Controlled Media."

B. SPECIFIC FORMS OF EXPRESSION

1. SPEECH (AND WITHIN-CLASS EXPRESSION)

Given the relatively low levels of traditional student protests over the last few years, the most frequent forms of student-school conflict over student expression tend to occur in everyday interaction between student and teacher in the classroom, with students being termed "disruptive," "disrespectful," "insolent," "insubordinate," etc. Yet, virtually none of the First Amendment court cases has arisen from these incidents. But see:

Dillon v. Pulaski County Special School District, 468 F.Supp. 54, 56-57 (E.D.Ark. 1978), aff'd, 594 F.2d 699 (8th Cir. 1979) (court, seemingly ignoring basic First Amendment principles, held that student who said "What a drag" when told to stop kissing in hall could be punished for "disrespect;" court, however, found for student because of procedural due process violations).

Cf.: Fenton v. Stear, 423 F.Supp. 767 (W.D.Pa. 1976) (calling teacher a "prick" in his presence constituted "fighting words");

Pelley v. Fraser, C.A. No. [illegible]-76-C-14 (E.D.Ark., 5/18/76) (Clearinghouse No. 19,518) (preliminary injunction issued on First Amendment grounds where student was removed from Student Council because, given an assignment for writing an introduction for a new character "perhaps a teacher just as Chaucer would have written it," plaintiff wrote a poem clearly directed at the school's principal and "notable only for its crude language and overall bad taste;" no evidence of disruption; further, due process question raised by punishing student for what appeared to be compliance with the assignment);

McCall v. State, 354 So.2d. 869 (Fla. 1978) (statute referring to one who "upbraids, abuses, or insults any member of the instructional staff on school property or in the presence of the pupils at a school activity," held overbroad because not tied to a narrow disruption standard);

Williams v. Turner, 382 So.2d 1040 (La.App. 1980) (concerning speech accompanying students' attempt to strike teacher who imposed corporal punishment, "Conspiracy to commit battery is not protected speech").

Despite the relatively small number of cases, it is nevertheless clear under Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), that the basic First Amendment principles discussed above apply to student speech in the classroom. Other Supreme Court cases demonstrate a special concern with academic freedom in the classroom:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. [*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).]
>
> . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).]
>
> . . . Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. . . .
>
> * * * *
>
> To regard teachers in our entire educational system, from the primary grades to the university, as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government. [*Wieman v. Updegraff*, 344 U.S. 183, 195-97 (1952) (J. Franfurter, concurring.)]
>
> The principal use to which the schools are dedicated is to accomodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. [*Tinker*, 393 U.S. at 512.]

Specific application of these principles to classroom issues at the lower court level has usually involved *teachers' challenges* to administration restriction and punishment. To some extent, the conflicting outcomes in these cases depend upon whether, in the particular court's view, the teachers are wrongly attempting to interfere with the administration's obligation to determine broad curriculum policy including the subjects and topics to be taught or whether, on the other hand, they are correctly attempting to pursue their right and obligation to present differing viewpoints and approaches to those subjects for purposes of stimulating critical inquiry. Compare cases decided against the teacher:

Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973);
Adams v. Campbell County School District, 511 F.2d 1242 (10th Cir. 1975);
Ahern v. Board of Education, 327 F.Supp. 1391 (D.Neb. 1971), aff'd, 456 F.2d 399 (8th Cir. 1972);
Palmer v. Board of Education, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 100 S.Ct. 689 (1980).
Mercer v. Michigan State Board of Education, 379 F.Supp. 580 (E.D. Mich.), aff'd without opinion, 419 U.S. 1081 (1974);

with cases finding for the teacher:

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969);
Parducci v. Rutland, 316 F.Supp. 352 (M.D.Ala. 1970);
Mailloux v. Kiley, 323 F.Supp. 1387 (D.Mass. 1971), aff'd, 448 F.2d 1242 (1st Cir. 1972);
Sterzing v. Fort Bond Independent School District, 376 F.Supp. 657 (S.D.Tex. 1972), vacated and remanded on other grounds, 496 F.2d 92 (5th Cir. 1974);
Wilson v. Chancellor, 418 F.Supp. 1358 (D.Ore. 1976);
de Groat v. Newark Unified School District, 133 Cal.Rptr. 225 (Ct.App. 1976);
Beebee v. Haslett Public Schools, 239 N.W.2d 724 (Mich.Ct.App. 1976).

See: Givhan v. Western Line Consolidated School District, 99 S.Ct. 693 (1979) (First Amendment protects teacher's right to complain privately to administrators).
Cf.: Minarcini v. Stongsville City School District, 541 F.2d 577 (5th Cir. 1976);
Cary v. Board of Education, 598 F.2d 535 (10th Cir. 1979);
Pico v. Board of Education, 638 F.2d 404 (2nd Cir. 1980), aff'd ____ S.Ct. ____, 50 U.S.L.W. 4831 (6/24/82);
Loewin v. Turnipseed, 488 F.Supp. 1138, 1153-54 (N.D.Miss. 1980);
Hunter v. Dallas Independent Sch. Dist., No. CA-3-77-0132-G (N.D.Tex. 10/20/78).

The Supreme Court has repeatedly stated that First Amendment rights include the right to "receive information and ideas."

Lamont v. Postmaster General, 381 U.S. 301 (1956);
Stanley v. Georgia, 394 U.S. 557 (1969);
Kleindienst v. Mandel, 408 U.S. 753, 762-64 (1972);
Procunier v. Martinez, 416 U.S. 396, 498-99 (1974);
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817, 1823 (1976).

The rights of students under these decisions have been recognized in:

Minarcini, supra;
Brooks v. Auburn University, 296 F.Supp. 188 (M.D.Ala. 1969), aff'd, 412 F.2d 1171 (5th Cir. 1969);
Smith v. University of Tennessee, 300 F.Supp. 777 (E.D.Tenn. 1969);
A.C.L.U. v. Radford College, 315 F.Supp. 893, 896 (W.D.Va. 1970);
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H. 1973), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973);
Wilson v. Chancellor, supra;
Right to Read Defense Committee of Chelsea v. School Committee, 454 F.Supp. 703, 714 (D.Mass. 1978);
Reineke v. Cobb County School District, 484 F.Supp. 1252, 1261 (N.D.Ga. 1980).
Cf.: Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980);
Pico, supra;
Pratt v. Independent School District No. 831, Forest Lake, 670 F.2d 771, 777 (8th Cir. 1982);
Loewin, supra;
Sheck v. Baileyville School Committee, 530 F.Supp. 679 (D.Me. 1982).

The complex nature of student-teacher-administrator relations requires that regulation of expressive conduct in the classroom be carefully scrutinized and narrowly limited on the basis of the "substantial and material disruption of the education process" standards (and that the "educational process" itself be structured in such a way that robust expression and exchange of views is seen not as a "disruption of the educational process" but as an integral part of that process). Otherwise, the school's legal authority concerning curriculum and its legitimate interests in maintaining order will slip into improper infringement of First Amendment rights. Thus, one court noted that, in applying the disruption standard to campus discussion, "unrealistic sensitivity to the fragility of schools and universities is inappropriate." Mabey v. Reagan, 537 F.2d 1036, 1050 (9th Cir. 1976). It has also been stated that "the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled and chilled." Scoville v. Board of Education, 425 F.2d 10, 14 (7th Cir.), cert. denied, 400 U.S. 826 (1970). Another court found that a school's interference with certain teaching methods was improper, noting that "to stimulate critical thinking, to create an awareness of our present political and social community and to enliven the educational process" are "desirable goals." Sterzing, 376 F.Supp. at 662.

While the academic freedom issues raised by these cases may at first glance seem far removed from the incidents in which students get disciplined for remarks which are "disruptive" or "insolent," First Amendment principles are nevertheless applicable. Further, these incidents can at least sometimes be seen as student response to a form of institutional control over students which discourages, among other things, the development of critical thinking and free inquiry. See also discussion of controversial opinions in §I.A.1.d.

On the other hand, those opinions above which have permitted some school restriction on what is taught (including, for example, the language used in textbooks even when not legally obscene), have recognized that, because the basis for these decisions is the school system's authority and necessity to be selective concerning curriculum choices, similar restrictions generally cannot be imposed on other aspects of teacher and student expression (including their reactions to and expressions concerning that curriculum). For these latter forms of expression, the traditional First Amendment limits on school interference are applicable.

In analyzing punishment of students for speech, even speech which is regarded as "profane," "disrespectful," "insubordinate," "disruptive," etc., these traditional First Amendment principles would dictate that, unless the speech meets the narrow definition of obscenity under §I.A.1.a (which students' remarks virtually never do) or the narrow definitions of "fighting words" or "incitement" under §I.A.1.d, the speech can generally be restricted only if the student's conduct in fact meets the "substantial disruption" standard as defined and discussed in §I.A.2. As that section indicates, unless "fighting words" or "incitement" are used, it is the student's conduct, and not the reactions of others, which is the focus of the disruption standard, and the standard must be applied only to the time, manner, and place of the student's conduct, not to the content or message of his/her speech. Thus, a student who gets up in the middle of class and continues talking in a manner which prevents the class from continuing is creating noise which is substantially disruptive without reference to the content of his/her remarks. (In some cases, however, the content may matter in the narrow sense that, for example, a student's speech about baseball in the middle of social studies class is likely to be disruptive of the educational process whereas a statement of the same length and volume but more related to the class's subject matter may not be.) See §§I.A.1.a, I.A.1.d, and I.A.2 for additional cases.

Finally, some disciplinary incidents involving speech may arise in part as issues of race or national origin (including native language). See §III.A, "Race and National Origin Discrimination," for discussion of issues of cultural differences, bias and selective perception by staff, and the frustration engendered by failure to provide full equal educational opportunity, all of which may come into play in verbal incidents.

2. SYMBOLIC EXPRESSION (BUTTONS, ARMBANDS, ETC.)

The right to wear buttons, armbands, and other symbols of expression has been specifically recognized by the Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), a case in which students wore armbands to protest the war in Vietnam; and in several lower court decisions:

Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966);
Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971);
Hatter v. Los Angeles City High School District, 452 F.2d 673 (9th Cir. 1971);
Aguirre v. Tahoka Independent School District, 311 F.Supp. 644 (N.D. Tex. 1970);
Aryan v. Mackey, 462 F.Supp. 90 (N.D.Tex. 1978)(wearing masks in demonstration as symbols of protest against Shah protected "symbolic" expression; school's attempt to justify restriction rejected).
See: James v. Board of Education, 461 F.2d 566 (2nd Cir. 1972), cert. denied, 409 U.S. 1042 (1972):
Yench v. Stockmar, 483 F.2d 820, 824 (10th Cir. 1973).
But cf.:
East Hartford Education Assn. v. Board of Education of the Town of East Hartford, 562 F.2d 838 (2nd Cir. 1977) (denying teacher's claim that not wearing necktie is protected "symbolic speech"; note also that the courts have generally been willing to uphold greater restrictions on teacher expression than on student expression).

Even symbols which are offensive to a significant portion of students or staff, such as swastikas and Confederate flags, are generally recognized as protected. See:

Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970);
Augustus v. Board of Public Instruction, 507 F.2d 152 (5th Cir. 1975).
Cf.: Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978);
Village of Skokie v. National Socialist Pary of America, 69 Ill.2d 605, 373 N.E.2d 21 (1978).

However, symbolic expression may be restricted where it constitutes official school endorsement of the offensive message.

Smith v. St. Tammany Parish School Board, 316 F.Supp. 1174, 1176-77 (E.D.La. 1970), aff'd, 448 F.2d 414 (5th Cir. 1971) (prohibiting school officials from displaying symbols of resistance to court-ordered desegregation but permitting students to do so).

Compare:
Banks, *supra*;
Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972)

On the other hand, restrictions on the exercise of these rights have been upheld in situations of sufficient actual or likely disruption.

Blackwell v. Issaquena County Board, 363 F.2d 749, 754 (5th Cir. 1966);
Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970);
Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973);
Hernandez v. School District No. 1 of Denver, 315 F.Supp. 289 (D.Colo. 1970);
Will v. Lewis, 323 F.Supp. 55 (E.D.N.C. 1971);
Wine v. Sauers, 345 F.Supp. 90 (E.D.Pa. 1972), *aff'd*, 481 F.2d 1400 (3rd Cir. 1973).

The First Amendment analysis in these latter decisions, however, has not always been fully adequate. As indicated in §I.A, the disruption standard applies to conduct, not content, which may not be restricted except for certain very narrow exceptions. Thus, a symbol worn on clothing rarely if ever disrupts. It is the conduct of others in reacting to the symbol which is disruptive, and the First Amendment mandates that, as a general rule, expression not be restricted because of the reactions of others. There are only two relevant exceptions to this general rule. First, content may be restricted where it constitutes "fighting words" or "incitement," as narrowly defined (in §I.A.1.d)--words which, in the particular context, are *both* intended to and likely to provoke imminent violence, violation of laws, or violation of valid school rules. Second, where the reactions of others are substantially disruptive, students may be ordered to temporarily refrain from the expression if there is in fact no other feasible way to prevent or stop the disruptive conduct of others (but cannot be punished, except for then refusing to obey the order). In at least some of these cases where the court upheld the school, the restrictions might have been upheld as fitting under one or the other of these two exceptions. For instance, in *Melton*, the wearing of a Confederate flag in the particularly tense racial situation in the school may have been "fighting words." For a much more careful analysis, compare *Aryan v. Mackey*, *supra*.

As in other First Amendment areas, judicial inquiry does not stop at a sufficient finding of disruption. The school must limit its response to that which is necessary to maintain order. See *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973): *Aryan v. Mackey*, *supra*.

The rights addressed here would also seem to include the right of the student to *refuse* to wear symbols which contain or stand for messages with which he/she disagrees. In Wooley v. Maynard, 97 S.Ct. 1428 (1977), the Supreme Court held that New Hampshire residents could not be forced to display the state Motto, "Live Free or Die," on their license plates, based on the First Amendment right "to refuse to foster, in the way New Hampshire demands, an ideal they find morally objectionable." (The decision was based on "freedom of conscience," rather than symbolic expression grounds.) See §I.B.8, "Freedom of Conscience--Flag Ceremonies, Etc."

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3. ACCESS TO SCHOOL-CONTROLLED MEDIA

a. EQUAL ACCESS TO EXISTING FORUMS

"Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper in addition to regular meeting space. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purpose, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial."

Healy v. James, 408 U.S. 169, 181-82 (1972)

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.... Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

Police Department of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

"The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not [sic.] unjustified by an overriding state interest. Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass. 1970); Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (M.D.Ala. 1967); Wirta v. Alameda-Contra Costa Transit District, 68 Cal. 2d 51, 64 Cal.Rptr. 430, 434 P.2d 982 (1967)."

Trujillo v. Love, 322 F.Supp. 1266, 1270 (D.Colo. 1971)(invalidating restrictions on editorials in college-funded student newspaper)

"...it is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed. See, e.g., Police Department of Chicago v. Moseley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc); Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C.Cir. 1972); People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972)."

Bonner-Lyons v. School Committee, 480 F.2d 442, 444 (1st Cir. 1973) (invalidating unequal access of different citizens' groups to school committee's internal system for disseminating notices to parents).

See also:

Widmar v. Vincent, 102 S.Ct. 269 (1981) (by allowing student groups to meet in its facilities, university created a forum generally open to student groups and could not therefore exclude a group because the content of its expression was religious);

Minarcini v. Strongsville City School District, 541 F.2d 577, 582 (6th Cir. 1976) (once the school board established a school library, it could not remove books on basis of its social or political tastes);

Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978) (striking down denial of use of school for KKK meeting);

American Civil Liberties Union of Virginia, Inc. v. Radford College, 315 F.Supp. 893, 896 (W.D.Va. 1970) (requiring that school recognize the student organization);

Channing Club v. Board of Regents, 317 F.Supp. 688 (N.D.Tex. 1970) (right to have unofficial student publication sold through campus bookstore);

University of Missouri at Columbus-National Education Association v. Dalton, 456 F.Supp. 985 (W.D.Mo. 1978)(teacher association access to campus mailing privileges and meeting facilities);

Salvail v. Nashua Board of Education, 469 F.Supp. 1269, 1272-73 (D.N.H. 1979)(similar holding to Minarcini);

Solid Rock Foundation v. Ohio State University, 478 F.Supp. 96 (S.D. Ohio 1979)(improper to restrict distribution of off-campus publications to 16 campus locations while allowing distribution of official student paper at 145 locations);

Princeton Education Association v. Princeton Board of Education, 480 F.Supp. 962 (S.D.Ohio 1979) (striking down rules which prevented nonresident teachers from speaking at all and prohibited any teacher from discussing employment terms and conditions during visitor recognition portion of school board meetings);

Hall v. Board of School Commissioners, 496 F.Supp. 697, 709-11 (S.D.Ala. 1980) (right of teachers to distribute literature on issues similar to school board literature);

Spartacus Youth League v. Board of Trustees, 502 F.Supp. 789 (N.D.Ill. 1980) (college's student union and outdoor walkways were "public forums" from which it could not bar non-students from distrubuting literature);
Hennessey v. Independent School District No. 4, 552 P.2d 1141 (Okla. S.Ct. 1976) (invalidating denial of school facilities to Parent Teacher Association).

Cf.: Carey v. Brown, 100 S.Ct. 2286 (1980) (similar to Mosley, supra);
Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2nd Cir. 1974) (non-school case, invalidating denial of organization's access to waiting room of welfare center for purpose of distributing literature);
International Society of Krishna Consciousness v. Rockford, 585 F.2d 263 (7th Cir. 1978) (airport);
Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation, 417 F.Supp. 632 (D.R.I. 1976) (non-school case, invalidating Bicentennial's refusal to endorse organization's bicentennial project, which prevented group from using official logo, being listed on program, and having access to central place for receptions and displays);
U.S. v. Boesewetter, 463 F.Supp. 370 (D.D.C. 1978) (park facilities used as public forum).

The same principles can be found in the cases concerning recognition of student organizations. The Supreme Court has held that where denial of official recognition restricted the organization's access to bulletin boards, the school newspaper, and meeting places, the burden on rights of expression and association were substantial, and the school had a heavy burden of showing that such denial was necessary for some important, valid school interest. Healy v. James, supra. See §I.B.6, "Association," for further discussion and other cases.

See also §I.B.4.a, "Official Student Publications," on the question of whether such publications are public forums which must accept political advertising and/or provide space for viewpoints contrary to those of the the editors.

b. RIGHT TO A FORUM WHERE NONE EXISTS

The cases above deal with the necessity for neutral treatment and open access once the school turns a facility into a "forum" by opening it up to some. Thus, denial of access has sometimes been upheld where it was found that no forum had been created:

Connecticut State Federation of Teachers v. Board of Education Members, 538 F.2d 471 (2nd Cir. 1976)(teacher organization could be denied use of school mailboxes and bulletin boards where both (a) these facilities had not become public forums since they had been restricted to official purposes and (b) the teachers had many other adequate alternatives for reaching the desired audience);
Buckel v. Prentice, 410 F.Supp. 1243 (S.D.Ohio 1976)(parent group access to distribution to other parents via students could be denied where that distribution system had not become a public forum);

Reid v. Barrett, 467 F.Supp. 124 (D.N.J. 1979), aff'd, 615 F.2d 1354 (3rd Cir. 1980) (no right of teachers to have student bring letter about union matters home to parents: students were not a public forum for this purpose to be treated as "a kind of public postal service;" the court took pains to distinguish this from a case in which the teachers were attempting to communicate with students, noting that the teachers here were simply attempting to use the students as a conduit to parents and did not care whether students read the letter; court also relied on availability of other effective means of communicating with parents).

Cf.: Dayan v. Board of Regents, 491 F.Supp. 138 (M.D.Ga. 1979), aff'd, 620 F.2d 107 (5th Cir. 1980).

Nevertheless, as Connecticut State Federation of Teachers and Reid indicate, the school may have an obligation to allow a facility to become a "forum" where there are not adequate alternative means of communication; in such cases, it may not always be able to deny access to a group simply by denying access "equally" to all groups. 538 F.2d at 480. See:

Brooks v. Auburn University, 296 F.Supp. 188, 198 (M.D.Ala. 1969), aff'd, 412 F.2d 1171 (5th Cir. 1973)(school cannot ban all outside speakers);
Albany Welfare Rights Organization, supra;
Friedman v. Union Free School District, 314 F.Supp. 223 (E.D.N.Y. 1970);
Wilson v. Chancellor, 418 F.Supp. 1358, 1361-62, 1364 (D.Ore. 1976) (high school cannot ban "all political speakers");
Kalven, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct.Rev. 1;
Note, "The Public Forum: Minimum Access, Equal Access, and the First Amendment," 28 Stan.L.Rev. 117 (1975).

Cf.: Substitutes United for Better Schools v. Rohter, 496 F.Supp. 1017, 1019 (N.D.Ill. 1980) (noting that students and teachers have First Amendment rights in schools regardless of whether the school is a public forum for purposes of other people).

See also cases concerning the right to receive information, cited in §I.B. 3.c, "Right to Invite and Hear Speakers."

As the quote from Healy points out, effective expression, and the ability to reach the desired audience, often depend upon more than one's own vocal chords. Increasingly, they require access to technological means of communication. Thus, the school's communication resources should not become an instrument of power by being restricted to the administration or a few select students.

Some process for allocation of the use of such resources may be necessary because of the limited nature of time, space, or money, or because the resources are needed for purposes of the curriculum. In these circumstances, however, the allocation process must be neutral, must not discriminate against any person or group and must not allow for the expression of some ideas but not others. In order to assure this, the First

Amendment requires that the criteria and procedures be spelled out with sufficient precision. See Brubaker v. Moelchert, 405 F.Supp. 837, 842 (W.D.N.C. 1975). Since denial of access to a forum is a form of prior restraint, the requirements for precise criteria and procedures applicable to other forms of prior restraint apply here as well. See cases and comments under §I.A.4, "Prior Restraint."

c. RIGHT TO INVITE AND HEAR SPEAKERS

The First Amendment embraces the "right to hear" and the right to receive information.

Lamont v. Postmaster General, 381 U.S. 301 (1965);
Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972);
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817, 1823 (1976);
Minarci v. Strongsville City School District, 541 F.2d 577, 583 (6th Cir. 1976);
Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980);
Pratt v. Independent School District, 670 F.2d 771 (8th Cir. 1982);
A.C.L.U. v. Radford College, 315 F.Supp. 893, 896 (W.D.Va. 1970);
Paton v. La Prade, 469 F.Supp. 773, 777 (D.N.J. 1978);
Right to Read Defense Committee of Chelsea v. School Committee, 454 F.Supp. 703, 714 (D.Mass. 1978);
Reineke v. Cobb County School District, 484 F.Supp. 1252, 1262 (N.D.Ga. 1980);
Scheck v. Baileyville School Committee, 530 F.Supp. 679 (D.Me. 1982).

Included within that right is the right of students and student organizations to invite to school and hear speakers of their own choosing.

Brooks v. Auburn University, 296 F.Supp. 188, 198 (M.D.Ala. 1969)(ban on all outside speakers would violate right to hear), aff'd, 412 F.2d 1171 (5th Cir. 1973);
Snyder v. Board of Trustees of University of Illinois, 286 F.Supp. 927, 932 (N.D.Ill. 1968)(right to listen to the speaker of one's choice);
Smith v. University of Tennessee, 300 F.Supp. 777 (E.D.Tenn. 1969) (right to hear);
Molpus v. Fortune, 311 F.Supp. 240 (N.D.Miss.(right to hear), aff'd, 432 F.2d 916 (5th Cir. 1970);
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H. 1973), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973);
Wilson v. Chancellor, 418 F.Supp. 1358, 1361-62, 1364 (D.Ore. 1976) (high school ban on "all political speakers" violates right to hear).

If a school allows some outside speakers to use school facilities, it cannot deny other speakers the use of those facilities merely because such speakers are deemed controversial or undesirable.

Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969);
Snyder, 286 F.Supp. at 933;
Stacy v. Williams, 306 F.Supp. 963, aff'd, 446 F.2d 1366 (5th Cir. 1971);
A.C.L.U., 315 F.Supp. at 896;
Brubaker v. Moelchert, 405 F.Supp. 837 (W.D.N.C. 1975);

Lawrence University Bicentennial Commission v. City of Appleton, 409 F.Supp. 1319 (E.D.Wis. 1976);
Hennessey v. Independent School District, 552 P.2d 1141 (Okla.S.Ct. 1976).

Cf. *Hall v. Board of School Commissioners*, 496 F.Supp. 697, 711 (S.D.Ala. 1980) (policy concerning visitors struck down for not conforming to First Amendment standards).

See also: Cases under §a, "Equal Access."

As *Brooks* points out, these principles of equal access apply regardless of whether school funds are being used for the event. 412 F.2d at 1173.

Demonstrations threatened in the event of a particular program should not be grounds for forbidding the program. Such demonstrations are expressions of opinion, subject to the limitations discussed in §I.A. See:

Terminiellc v. Chicago, 337 U.S. 1, 4 (1949);
Gregory v. Chicago, 394 U.S. 111 (1969);
Brandenburg v. Ohio, 395 U.S. 444 (1969);
Jones v. Board of Education, 436 F.2d 618, 621 (9th Cir. 1970):
Crews v. Clonc, 432 F.2d 1259, 1265 (7th Cir. 1972);
Shanley v. Northeast Independent School District, 462 F.2d 960, 974 (5th Cir. 1972).

Cf. *Westley v. Rossi*, 305 F.Supp. 706, 712 (D.Minn. 1969);
Sullivan v. Houston Independent School District, 333 F.Supp. 1149, 1153 (S.D.Tex. 1971);
Jacobs v. Board of School Commissioners, 349 F.Supp. 605, 611 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975).

The basic principles discussed in §I.A.1.d concerning controversial opinions apply here -- particularly the line between advocacy and action: Even speakers who advocate violation of law cannot be prohibited unless *their* conduct (not the conduct of others) is substantially disruptive or their words are "fighting words" or "incitement" (as narrowly defined in the comments to that section), or there is no feasible way to control the disruptive conduct of others without having the speaker stop. (See also comments to §I.B.5 on assembly.) See *Brooks v. Auburn University*, 296 F.Supp. at 197, for a good discussion on some of these issues.

The general First Amendment rule that any regulation of expression must be based on precise regulations which spell out valid criteria (unrelated to the content or viewpoint -- except for proper narrow definitions of "incitement" or "fighting words") and speedy, fair procedures has been applied in speaker cases:

Brooks, 472 F.2d at 1172-73;
Snyder, 286 F.Supp. at 933-36 (prohibition on representatives of subversive organizations denies due process because it lacks necessary precision, because it is an unjustifiable prior re-

straint, and because it lacks procedural safeguards);

Dickson v. Sitterson, 280 F.Supp. 486 (M.D.N.C. 1968)(overturning ban on Communists and those who advocate overthrow of the Constitution);

Smith v. University of Tennessee, supra (criteria overturned as not precise enough: lack of competence and topic relevant to school's purpose, speaker who "might speak in a libelous, scurrilous or defamatory manner or in violation of public laws which prohibit incitement to riot," speakers at a time which is not "in the best interests of the university");

Stacy v. Williams, supra (improper to ban speakers who "will do violence to the academic atmosphere," are "in disrepute" or "advocates a philosophy of the overthrow of the government");

Brubaker v. Moelchert, 405 F.Supp. at 842 (overturning criteria of work "compatible with or supplementary to the educational outreach of the University" and function "appropriate to the building or space");

Hall v. Board of School Commissioners, 496 F.Supp. at 711-12 (school visitors policy lacked standards or adequate review procedures).

See general comments to §I.A.4, "Prior Restraint;" §I.A.3, "Clear and Precise Regulations," and §I.B.5, "Freedom of Assembly."

For further discussion, see Center for Law and Education, The Constitutional Rights of Students, 97-99 (1976).

d. "BALANCED" PRESENTATIONS

As discussed above, schools cannot present one viewpoint without allowing opposing views to be presented upon request. The school cannot, however, require that a group of students who advocate one view, for instance by sponsoring a speaker, also take responsibility for presenting an opposing view by sponsoring another speaker with whom they do not agree. As the court noted in Brooks v. Auburn University, 296 F.Supp. 188, 198 (M.D.Ala. 1969), aff'd, 412 F.2d 1171 (5th Cir. 1973),

> Conflicting points of view on sensitive current topics must be -- where people want to hear them -- afforded a forum. The denial of the right to hear these conflicting views -- even though those in aughority believe them to be unwise or un-American -- violates the very ideas of our government. [Emphasis added.]

See also §I.B.1, "Speech;" §I.B.4.a, "Official Student Publications;" and §I.B.8, "Freedom of Conscience."

4. PRESS

"Congress shall make no law . . . abridging the freedom . . . of the press. . . ."

United States Constitution, Amendment I

The provisions on freedom of the press, below, are separated into three different sections. This is done in order to make it clear that the school has much less, if any, authority to regulate the content of printed material, regardless of whether it is an official student newspaper (§4a) or an unofficial leaflet or underground paper (§4b), than it has in regulating the time, place, or manner of distribution of such material (§4c).

A good source of information and assistance in this area is the Student Press Law Center, 1033 30th Street N.W., Washington, D.C. 20007, (202) 965-4017. They have published a Manual for Student Expression: The First Amendment Rights of the High School Press (1976); and they issue a magazine three times a year, the Student Press Law Center Report, which contains updates on cases and other stories, as well as legal and policy analysis.

a. OFFICIAL STUDENT PUBLICATIONS

Schools often try to control the student newspaper, sometimes subtly and sometimes overtly. See *Captive Voices: The Report of the Commission of Inquiry into High School Journalism*, Schocken Books (N.Y. 1974), convened by the Robert F. Kennedy Memorial, prepared by Jack Nelson. See also the issues of the Student Press Law Center *Report*.

It may be that the fact that a student publication is sponsored by the school entitles the school, in a particular set of special circumstances, to apply certain narrowly tailored regulations which are not applicable to other literature. This might be because the paper has been established by a journalism or English department as an instructional tool. See *Trujillo v. Love*, 322 F.Supp. 1266, 1270 (D.Colo. 1971). Or it might be because of the expenditure of school funds. See *Koppell v. Levine*, 347 F.Supp. 456, 460 (E.D.N.Y. 1972).

Courts' Rejection of Attempts to Control

Nevertheless, school officials' attempts to justify such regulation have *consistently* been rejected by courts in the cases which have arisen.

Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), *modified and aff'd en banc*, 489 F.2d 255 (1973), *cert denied*, 416 U.S. 995 (1974) (university cannot edit material out of school paper on theory that it is a private publisher with unlimited editorial rights; ties to English department and financial contributions not significant enough to justify censorship);

Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)(university paper's advocating racial segregation cannot justify cut-off of funds);

Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (paper's printing of open letter using "four-letter" epithet to describe university president did not justify suspension of writer and editor);

Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (alleged violation of guidelines concerning poor grammar and spelling and "unacceptable" language which could bring disrepute to school not sufficient to justify university control of student publication and removal of editors in absence of evidence that such control was necessary in order to maintain order and discipline);

Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (M.D.Ala. 1967), *vacated as moot sub nom. Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (suspension of student-editor for disregarding instruction on content unjustified where unrelated to maintenance of order and discipline);

Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969)(principal may not refuse to allow publication of paid advertisement against

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Vietnam War, where paper had accepted purely commercial advertising and had published controversial news articles; material cannot be prohibited on grounds that it deals with non-school issues; access to other forums does not justify restriction);

Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass. 1970)(prior review procedure for obscenity procedurally defective; court doubted whether any prior restraint, regardless of procedures, could be justified; cut-off of funds improper);

Korn v. Elkins, 317 F.Supp. 138 (D.Md. 1970) (refusal to permit publication of burning American flag on cover of student feature magazine unjustified in absence of evidence that action was necessary to preserve order);

Trujillo v. Love, supra, (dismissal of paid student editor of college paper for writing editorials sarcastically criticizing college president and local judge unjustified);

Koppell v. Levine, supra, (four-letter words and reference to a sexual movie scene did not justify impoundment of high school literary magazine where constitutional criteria for obscenity were not met);

Beyer v. Kinzler, 383 F.Supp. 1164 (E.D.N.Y. 1974)(impoundment of sex education supplement to high school newspaper unjustified where not necessary to prevent substantial and material disruption of school work and discipline);

Gambino v. Fairfax County School Board, 429 F.Supp. 731 (E.D.Va.), aff'd, 564 F.2d. 157 (4th Cir. 1977) (ban on publication of article on birth control in student newspaper unjustified; court rejected various factors offered as rationales by school -- school board policy against including birth control in curriculum, school funding, academic credit for staff members, distribution in homerooms, requirement that students who want a yearbook must subscribe, and paid faculty advisor);

Reineke v. Cobb County School District, 484 F.Supp. 1252 (N.D.Ga. 1980) (neither faculty adviser nor principal could censor article on teacher attitudes toward homosexual teachers, article critical of student council president, article describing prior segregationist statements of school board members, article describing censorship of previous issue, occasional use of word "damn", and other articles; court rejected defenses based on disruption, libel, vulgar language, copyright infringement, statistical errors, grammatical and spelling errors, personal attacks, projected impact on race relations, improper journalistic form, and financial insolvency caused largely by school's censorship; absence of additional funds "is no defense" to discontinuation of paper; "[i]f necessary, the funding must be provided by the defendants from sources otherwise available");

Wesolek v. Board of Trustees, Civil No. 73-5-101 (N.D.Ind., May 25, 1973) (Clearinghouse No. 10,376B) (temporary restraining order issued against school authorities who refused to permit article on birth control).

But cf.:

Trachtman v. Anker, 563 F.2d. 512 (2nd Cir. 1977), cert. denied, 435 U.S. 925 (1978) (distribution of sex-survey by students to students in high school could be prohibited based on evidence of potential psychological injury);

Frasca v. Andrews, 463 F.Supp. 1043 (E.D.N.Y. 1979) (following Trachtman; principal who stopped distribution had adequate grounds for forecasting substantial disruption from one very hostile letter-to-the-editor and for believing that another contained false and damaging information about a student; court rejected school's other arguments concerning "fighting words," "obscenity," and "invasion of privacy."

As these cases make clear, once a school establishes an official student forum it will be held to the same Tinker standard -- of substantial and material disruption -- as is applicable to non-school-sponsored expression before it may interfere with that publication. (See §I.A.2 concerning that standard. See also the quote from Trujillo v. Love in §I.B.3, "Access to School-Controlled Media.")

Withdrawal of Funding

Where school funding is involved, the school may alter that funding for financial or other legitimate reasons unrelated to First Amendment issues, but it clearly may not do so in any way which results in censorship or control. See especially:

Bazaar, supra;
Joyner, supra;
Antonelli, supra;
Trujillo, supra;
Reineke, supra (the court also rejected the school's claim that additional funds were not available).

Prior Review

As discussed in §I.A.4, there is a heavy legal presumption against any form of prior approval or censorship. As that section notes, there is a strong argument that this presumption cannot be countered in the school context and that all prior restraint should be forbidden. The court in Antonelli v. Hammond, 308 F.Supp. at 1135-36 n.6, found it "extremely doubtful" that prior review of a college-sponsored newspaper could ever meet the justification: "Newspaper censorship in any form seems essentially incompatible with freedom of the press."

Nevertheless, there are some jurisdictions in which prior review is permitted, upon certain stringent conditions. First, material cannot be censored as inappropriate unless it in fact meets the legal definition of obscenity or libel, as indicated in many of the cases summarized above. Second, in those jurisdictions which allow prior review at all, the school must follow the procedural requirements stated in Freedman v. Maryland, 380 U.S. 51 (1965), as pointed out in Antonelli, 308 F.Supp. at 1355. Since most of the prior review cases have dealt with non-school-sponsored literature, these procedural requirements are discussed below in §I.B.4.b.

Duty to Accept Advertising about Political Issues

A principal's attempt to ban an advertisement which the students wanted to accept was struck down in Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969). This is entirely consistent with the cases above.

A more difficult question is whether the student editors of a school-sponsored publication can keep out any or all advertising, since this may bring into conflict two First Amendment values: student editorial control of the paper and equal access to state-sponsored forums. Compare:

Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971) (student editors not free to reject certain advertisements because of political views);
Joyner v. Whiting, 477 F.2d 456, 462 (4th Cir. 1973) (racially discriminatory advertising policy struck down; state-sponsored forum must be open to expression of contrary views);
with Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1973), cert. denied, 430 U.S. 982 (1977) (students free not to print an advertisement; their editorial independence meant that there was not state action).
See: Arrington v. Taylor, 380 F.Supp. 1348, 1364 (M.D.N.C. 1974), aff'd, 526 F.2d 587 (4th Cir. 1975), cert. denied, 96 S.Ct. 1111 (1976) (paper could be viewed as independent of state for purposes of content and editorial control and yet be viewed as state action for other purposes).
Cf.: Sellman v. Baruch College, 482 F.Supp. 475, 477-79 (S.D.N.Y. 1979) (student government action treated as state action for purposes of determining validity of its rules for candidates' eligibility);
Mississippi Gay Alliance, supra, 536 F.2d at 1076, 1087 (Goldberg, J., dissenting) [student editors should have unfettered control over "editorial product" (news, editorials, etc., and "probably" guest columns and letters), but should be required to use non-discriminatory access policy for advertising space, if any];
Cases and discussion in §I.B.3.a, "Equal Access to Existing Forums."

Protection of Student Editors

The cases above make it clear that First Amendment editorial control also protects against wrongful dismissal of student editors:

Thonen v. Jenkins, *supra*;
Schiff v. Williams, *supra*;
Dickey v. Alabama State Board of Education, *supra*;
Trujillo v. Love, *supra*;
Reineke v. Cobb County School District, *supra*.

See also:
St. Ledger v. Deering, C.A.No. C-15-7015 (Cal.Super.Ct., L.A.Cty., May, 1976) (order reinstating student editor).

Disclaimer of School Responsibility

Schools have the right to insist that the student newspaper print a statement that the school is not responsible for the contents or opinions of the paper.

Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973);
Vail v. Board of Education, C.A. No. 72-178 (Order and Consent Agreement, 4/18/74, following remand for further relief, 502 F.2d 1159).

See: *Koppell v. Levine*, 347 F.Supp. 456, 460 (E.D.N.Y. 1972);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 849 n.3, 851 (S.D.Cal. 1976).

As indicated by these cases, as well as those cited above, the school cannot justify censorship by claiming that it can be held liable for the contents. Note also the Supreme Court's long-standing pronouncement that control of defamation is not a sufficient grounds for prior restraint, as opposed to subsequent punishment. *Near v. Minnesota*, 283 U.S. 697 (1931). If the school thus may not censor student publications for purposes of eliminating defamation it may not be held responsible for such defamation.

b. NON-SCHOOL-SPONSORED LITERATURE

Scope of Protection

Under the *Tinker* standard, the right to publish, possess, and distribute non-official literature (leaflets, pamphlets, underground papers, petitions, etc.) has been uniformly recognized by the courts. See, for example:

Papish v. Board of Curators, 410 U.S. 667 (1973);
Scoville v. Board of Education, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970);
Riseman v. School Committee of Quincy, 439 F.2d 148 (1st Cir. 1971);
Eisner v. Stamford Board of Education, 440 F.2d 803 (2nd Cir. 1971);
Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1972);
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972);
Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972);
Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (S.D.Tex. 1969);
Channing Club v. Board of Regents, 317 F.Supp. 688 (N.D.Tex. 1970);
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H.), *remanded for further relief*, 502 F.2d 1159 (1st Cir. 1973);
Brubaker v. Moelchert, 405 F.Supp. 837 (W.D.N.C. 1975);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842 (S.D.Cal. 1976);
Solid Rock Foundation v. Ohio State University, 478 F.Supp. 96 (S.D. Ohio 1979);
Hernandez v. Hanson, 430 F.Supp. 1154 (D.Neb. 1977);
Rowe v. Campbell Union High School, C.A. No. 51060 (N.D.Cal., Sept. 4, 1970);
O'Reilly v. San Francisco Unified School District, C.A. No. 51427 (N.D.Cal., Nov. 10, 1970);
In re Brociner, 11 N.Y.Ed.Rep. 204 (N.Y.Ed.Comm'r 1972).
Cf.: *Thomas v. Board of Education*, 607 F.2d 1043 (2nd Cir. 1979) *cert. denied*, 100 S.Ct. 1034 (1980) (improper regulation of newspaper basically produced and distributed off campus).

(See also cases establishing the right to receive information, cited at §I.B.3.c, "Right to Invite and Hear Speakers.")

This right applies regardless of whether the material was written by students or non-students.

Jacobs v. Board o[illegible]chool Commissioners, 490 F.2d 601, 606 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975);

Channing, supra, 317 F.Supp. at 692;
O'Reilly, supra.
See: Riseman, supra;
Peterson v. Board of Education, 370 F.Supp. 1208 (D.Neb. 1973);
Solid Rock Foundation, supra;
Hernandez v. Hanson, supra.

Nor is this right limited to school-related issues. See:

Tinker v.Des Moines Independent Community School District, 393 U.S. 503 (1969);
Thomas v. Collins, 323 U.S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest");
Riseman, supra;
Hatter v. Los Angeles City High School District, 452 F.2d 673 (9th Cir. 1971)("It is not for this or any other court to distinguish between issues and to select for constitutional protection only those which it feels are of sufficient social importance");
Hernandez v. Hanson, supra.

The Tinker standard for prohibiting distribution of literature which produces material and substantial disruption is treated under §c below, as a matter of regulating time, place, and manner of distribution, rather than here. This stems from the belief that such disruption can be handled as a question of conduct accompanying the distribution process and should not be treated as a question of the content of the printed material. (This distinction is further discussed in §I.A.1.d and §I.A.2.)

Prior Approval

Prior review of literature is forbidden altogether in:

The First Circuit, by Riseman v. School Committee, supra (but school can require that students give administrator a copy for informational purposes at the same time, rather than before, the distribution starts);
The Seventh Circuit, by Fujishima v. Board of Education, supra;
California, under state law, by Bright v. Los Angeles Unified High School District, 556 P.2d 1080 (Cal. 1976).

As noted in §I.A.4, there is a heavy legal presumption against the use of prior review and where it is permissable at all, there must be stringent procedural safeguards, as set out in Freedman v. Maryland, 380 U.S. 51, 58-59 (1965). Thus, virtually every case in which a court has stated that prior review of school literature is or may be permissable has nevertheless ruled against the school for failing to institute the correct procedures. See for example:

Eisner, *supra*;
Quarterman, *supra*;
Shanley, *supra*;
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973);
Nitzberg, *supra*;
Hernandez v. Hanson, *supra*.

The *Freedman* standards require (assuming that the school has met the heavy burden of showing the overriding need for *prior* review), first, that the censoring agent must meet the burden of proof that the material is not protected expression. The absence of clear, narrow, and precise publshed standards for making this determination and for defining legally unprotected material will invalidate the review procedures.

Quarterman, 453 F.2d at 59;
Shanley, 462 F.2d at 976-77;
Baughman, 478 F.2d at 1350 ("libelous" and "obscene" not defined):
Nitzberg, 525 F.2d at 383 ("substantial disruption" and "material interference" not defined, "libelous" improperly defined);
Antonelli v. Hammond, 308 F.Supp 1328, 1335-36 (D.Mass. 1970);
New Left Education Project v. Board of Regents, 326 F.Supp. 158, 165 (W.D.Tex. 1970), *vacated on other grounds*, 404 U.S. 541 (1972), 414 U.S. 807 (1973);
Pliscou, 411 F.Supp. at 850 ("incites students toward the disruption of the orderly operation of the school" vague);
Leibner v. Sharbaugh, 429 F.Supp. 744 (E.D.Va. 1977)(journalistic standards of accuracy, taste and decency maintained by the newspapers of general circulation in Arlington," "obscenity," "libelous," "material in violation of law or lawful regulation," and "incitements to crime" all vague);
Hall v. Board of School Commissioners, 496 F.Supp. 697, 709-11 (S.D.Ala. 1980) (striking down policy requiring prior approval of "political or sectarian" or "special interest" literature and lacking standards for approval);
Spartacus Youth League v. Board of Trustees, 502 F.Supp. 789, 801-02, (N.D. Ill. 1980).
Cf.: *Hernandez v. Hanson*, *supra* (although not requiring published rules on literature distribution, the court struck down as overbroad a policy which permitted prior restraint which was not tied to a narrow, substantial discipline standard).
But cf.:
Frasca v. Andrews, 463 F.Supp. 1043 (E.D.N.Y. 1979).

Second, the prior review requirement must not have the effect of making the censor's determination final. He/She must, within a *short*, specified period, either allow the material to be distributed or go to court to get a judicial determination that distribution should be prohibited; if he/she chooses the latter, the distribution may be prohibited until the court has had time to act. Thus, the burden of seeking review is on the censor. In the school literature context, prior approval schemes have been invalidated for failing to specify to whom and how material should be submitted:

Eisner, 440 F.2d at 811;
Shanley, 462 F.2d at 978;

for failing to specify a precise and sufficiently short time by which the decision-maker must act:

Eisner, 440 F.2d at 810;
Quarterman, 453 F.2d at 60;
Shanley, 462 F.2d at 978;
Baughman, 478 F.2d at 1348;
Nitzberg, 525 F.2d at 383-84;
Pliscou, 411 F.Supp. at 850;
Leibner, 429 F.Supp. at 749;
Cf.: *Hernandez v. Hanson*, *supra*, 430 F.Supp. at 1162 n.4 ("the two day review period may, in certain situations, be an unconstitutionally impermissable length of time");

and for failing to state what is to happen if the principal fails to act by the specified deadline:

Baughman, 478 F.2d at 1348;
Pliscou, 411 F.Supp. at 850.

The third *Freedman* requirement is that the procedure must assure a prompt final judicial decision. In the school context, courts have sometimes, after citing *Freedman*, referred only to a right to a prompt appeal, usually without any discussion of the judicial review requirement. See:

Shanley, 462 F.2d at 978;
Baughman, 478 F.2d at 1351;
Hall, 496 F.Supp. at 711-12;
Spartacus Youth League, 502 F.Supp. at 802.

In *Eisner*, 440 F.2d at 810, the court stated that the appeal need not be to a court. But see *Antonelli*, 308 F.Supp. at 1335-36, where the court included failure of the school to seek prompt judicial review of its censoring decision as one of the procedural inadequacies.

The *Freedman* requirement that the procedure must not have the *effect* of making the censor's decision final will mean that in certain cases review must be quick indeed, for there are protest situations in which even short delays will be enough to render distribution completely ineffective. Thus, a three-judge court has pointed out that where the literature is "political or social, and the effectiveness of the item may be severely diminished by even a brief delay in its distribution, it may be that even one day's restraint is an impermissable burden." *Rowe v. Campbell Union*

High School District, C.A. No. 51060 (N.D.Cal. 1971). See Hernandez v. Hanson, supra, 430 F.Supp. at 1162 n.4. Similarly, in Baughman, 478 F.2d at 1348-49, the court stated, " . . . whatever period is allowed, the regulation may not lawfully be used to choke off spontaneous expression in reaction to events of great public importance." Cf. Powe v. Miles, 407 F.2d 73, 84 (2nd Cir. 1968). But Cf. Williams v. Spencer, 622 F.2d 1200, 1206-07 (4th Cir. 1980) (in case involving rules for halting of distribution after distribution had begun, court upheld appeals procedures which required decisions within ten days, without discussing potential impact on timely expression,but court relied in part on absence of prior restraint).

Other grounds for invalidating prior review procedures include failure to define "distribution" (otherwise, it might apply to giving a single copy to a friend):

Eisner, 440 F.2d at 811;
Shanley, 462 F.2d at 977;
Baughman, 478 F.2d at 1349;
Hernandez v. Hanson, supra, 430 F.Supp. at 1160-61 (improper to require prior review for distribution to only "several students");
Hall, 469 F.Supp. at 709;

and failing to provide for the student's right to appear before the censor to present his/her views:

Nitzberg, 525 F.2d at 384-85;
Leibner, 429 F.Supp. at 749.

Fund-Raising, Sale of Literature, Paid Advertising, Etc.

"We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another . . . Speech is likewise protected even though it is carried in a form that is "sold" for profit, . . . and even though it may involve a solicitation to purchase or otherwise contribute money."

Virginia State Board of Pharmacy v.
Virginia Citizens Consumer Council, Inc.
425 U.S. 748, 761 (1976)

Other cases holding that advertising used to support publications which promote expression cannot be banned include:

New York Times Co. v. Sullivan, 376 U.S. 254 (1964);
Peterson, supra;
Brubaker v. Moelchert, 405 F.Supp. 837, 841-42 (W.D.N.C. 1975);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 848-49 (S.D.Cal. 1976).

But Cf.:

Williams v. Spencer, *supra*, 622 F.2d at 1205 (upholding halting of distribution, based on local regulation, of non-sponsored student newspaper which contained an advertisement for a store selling drug paraphernalia used in connection with marijuana, hashish, and cocaine).

Bans on the sale of literature have also been overturned in:

Jacobs v. Board of School Commissioners, 490 F.2d 601, 608 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975);
Nitzberg v. Parks, 525 F.2d 378, 383 n.4 (4th Cir. 1975);
New Left Education Project, 326 F.Supp. at 163-65;
Peterson, 370 F.Supp. at 1213-14;
Pliscou, 411 F.Supp. at 850;
Substitutes United for Better Schools, 496 F.Supp. 1020 (N.D.Ill. 1980);
Cf.: *Scoville v. Board of Education*, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970);
Leibner v. Sharbaugh, *supra*, 429 F.Supp. at 749 n.3;
Spartacus Youth League, *supra*.

In *Virginia State Board*, the Supreme Court went beyond this and held that even purely commercial speech (e.g., the advertising of prescription drug prices in that case) is protected by the First Amendment. The Court did note that purely commercial speech may be subject to greater regulation than other forms or expression or than commercial activity which is used to support expressive activities, but such restrictions would have to be justified under First Amendment principles and could not be based on the various rationales rejected in that case, which the Court found were improperly based "in large measure on the advantages of [people] being kept in ignorance." 425 U.S. at 769.

See also:

Carey v. Population Services International, 431 U.S. 6781, 700-701 (1977) (advertisement and display of contraceptives available to minors);
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorney advertising fee schedule found to be protected under the First Amendment);
Central Hudson Gas v. Public Services Commission of New York, 100 S.Ct. 2343 (1980) (extensive discussion of standards for analyzing restrictions on commercial speech).
Cf.: *Hernandez v. Hanson*, *supra*, 430 F.Supp. at 1161 (overturning school's ban on "commercial literature").

But see:

American Future Systems v. Pennsylvania State University, 464 F.Supp. 1252 (M.D.Pa. 1979), *aff'd*, 618 F.2d 252 (3rd Cir. 1980); 522 F.Supp. 544 (1981) (court upheld university rules which placed certain limits on purely commercial solicitation in dormitories, where certain methods of solicitation in the dormitories or elsewhere were available).

c. MANNER OF DISTRIBUTION

Time, Place, and Manner Regulations Generally

Schools may issue rules and regulations concerning time, place, and manner of literature distribution. E.g.:

Riseman v. School Committee of Quincy, 439 F.2d 148, 149 n.2 (1st Cir. 1971)
Fujishima v. Board of Education, 460 F.2d 1355, 1359 (7th Cir. 1972);
Shanley v. Northeast Independent School District, 462 F.2d 960, 969 (5th Cir. 1972).

However, under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 502 (1969), students may exercise their rights of free expression so long as their conduct does not substantially and materially disrupt the educational process. Thus, "reasonable" regulations of time, place, and manner are only those which are reasonably necessary to prevent such disruption and which are narrowly tailored so that they do not also prohibit distribution at those times and places which are unlikely to create such disruption.

Grayned v. City of Rockford, 408 U.S. 104, 115-19 (1972);
Healy v. James, 408 U.S. 169, 189 n.20 (1972);
Shanley, 462 F.2d at 974;
Gay Students Organization v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974);
New Left Education Project v. Board of Regents, 326 F.Supp. 158, 163-64 (W.D.Tex. 1970), *vacated on other grounds*, 404 U.S. 541 (1972), 414 U.S. 807 (1973);
Peterson v. Board of Education, 370 F.Supp. 1208, 1214 (D. Neb. 1973);
Solid Rock Foundation v. Ohio State University, 478 F.Supp. 96, 101-02 (S.D.Ohio 1979).

See: *Leibner v. Sharbaugh*, 429 F.Supp. 744, 749 (E.D.Va. 1977).
Cf.: *Heffron v. International Society for Krishna Consciousness*, 101 S.Ct. 2559 (1981).

See also §I.A.2 on time, place, and manner regulations and the disruption standard.

The burden of justifying this necessity is upon the school, and it must be met by objective evidence, not undifferentiated fear or what "might" happen or "could" happen.

Scoville v. Board of Education, 425 F.2d 10, 13-15 (7th Cir.), *cert. denied*, 401 U.S. 826 (1970);

Jones v. Board of Regents, 436 F.2d 618, 621 (9th Cir. 1970);
Eisner v. Stamford Board of Education, 440 F.2d 618, 621 (2nd Cir. 1971);
Channing Club v. Board of Regents, 317 F.Supp. 688, 691 (N.D. Tex. 1970);
Peterson, 370 F.Supp. at 1214;
Vail v. Board of Education of Portsmouth School District, 354 F.Supp. 592, 599 (D.N.H.), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973).

Once a school enacts regulations of time, place, and manner which meet this standard, it can legally discipline students who violate the regulations, without showing that the particular violation itself produced substantial and material disruption. See:

Fujishima, 460 F.2d at 1359;
Sullivan v. Houston Independent School District, 475 F.2d 1071, 1076 (5th Cir.), cert. denied, 414 U.S. 1032 (1973).

The school is not only entitled to issue specific, reasonable regulations for time, place, and manner, narrowly tailored to prevent substantial disruption; it has an obligation to do so. This is true, on the one hand, where prior restraint is not permitted: "The board has the burden of telling the students when, how and where they may distribute materials." Fujishima, 460 F.2d at 1359. Mere reliance on a rule forbidding distribution in times, places, or manners "which cause substantial and material disruption," without spelling out the standard more specifically, would be unconstitutionally vague. (See §I.A.2). On the other hand, specific regulations are also necessary in those jurisdictions which permit prior restraint, for the decision-maker must operate according to published, precise, and narrow criteria as to what is not a permissable time, place, and manner.

Freedman v. Maryland, 380 U.S. 51 (1965);
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969);
Quarterman v. Byrd, 453 F.2d 54, 57 (4th Cir. 1972);
Shanley, 462 F.2d at 976-77;
Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975);
Leibner v. Sharbaugh, supra.

See also discussion of prior approval in §I.B.4.b, above.

Time of Distribution

Regulations may forbid literature distribution by or to students engaged in, or supposed to be engaged in, normal classroom activities.

Riseman v. School Committee of Quincy, 439 F.2d 148, 149 n.2 (1st Cir. 1971);
Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D.Mass., Apr. 6, 1972);

See: *Jacobs v. Board of School Commissioners*, 490 F.2d 601, 609 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340 (S.D.Tex. 1969);
New Left Education Project v. Board of Regents, 326 F.Supp. 158, 164 (W.D.Tex. 1970), *vacated on other grounds*, 404 U.S. 541 (1972), 414 U.S. 807 (1973);
In re Schiener, 11 N.Y.Ed.Rep. 293, 294 (N.Y.Ed.Comm'r 1972).

This is more narrow than rules which, for example, forbid distribution "while classes are being conducted in the school." In *Jacobs*, the court held that a rule of the latter type was unconstitutional, pointing out that there appeared to be certain periods during the school day during which, while some classes were in session, substantial numbers of students were not involved in classes and would be improperly barred by the rule from distributing and receiving literature. 490 F.2d at 609. See *Riseman*, 439 F.2d at 149 n.2. Note also that in *Sullivan*, the court held that, where students distributed literature outside the school, the fact that three teachers found it necessary to confiscate the papers from students reading them in class and that some other copies were left in other places was not grounds for finding the distribution improper -- both because the disruption was minor rather than substantial and because the school should discipline the students who actually disrupted class rather than the students who distributed the literature. See also *Rowe v. Campbell Union High School District*, Civil No. 51060, Mem. Op. at 8-9 (N.D.Cal., Nov. 10, 1970).

Place of Distribution

As with the regulation of time of distribution, the school has the burden of justifying its rules concerning place of distribution by showing that they are reasonably necessary to prevent substantial disruption and that they are drawn as narrowly as possible so that they do not also restrict non-disruptive distribution. Attempts to limit distribution to only a few isolated places within the building or to restrict it to outside the building altogether are thus generally improper.

Riseman, *supra*;
Fujishima v. Board of Education, 460 F.2d 1355, 1359 (7th Cir. 1972);
Sullivan, 307 F.Supp. at 1340;
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H.), *remanded for further relief*, 502 F.2d 1159 (1st Cir. 1973);
New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 369, 519 P.2d 169 (1974);

Solid Rock Foundation, *supra*.

Note also that "the argument that the existence of an alternative forum or mode of expression permits suppression of the chosen one has consistently been rejected." *Rowe*, Mem. Op. at 6, citing *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). For other cases making this point, see §I.A.2, "Restrictions on Time, Place, and Manner." See also the quote from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512-13, found in §I.A.2, in which the Supreme Court discusses the physical scope of permissable expression within the school.

Noise

Students can be required to distribute in a manner which does not produce levels of noise which interfere with classes. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972), discussed more fully in §I.B.5, "Assembly."

Interference with Rights of Others

Students can be prohibited from interfering with the rights of others to accept or reject literature. See:

Tinker, 393 U.S. at 504 n.1;
Shanley v. Northeast Independent School District, 462 F.2d 960, 970, 971 n.8 (5th Cir. 1972);
Jacobs v. Board of School Commissioners, 349 F.Supp. 605, 611 (S.D.Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975);
Rowe, Mem. Op. at 7.

Littering

Littering is not a sufficient reason to limit the right to distribute. As with other forms of expression, responsibility for littering and other reactions to distribution lies with those who react.

Schneider v. New Jersey, 308 U.S. 147, 162 (1939);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340, 1342 (S.D.Tex. 1969);
Brubaker v. Moelchert, 405 F.Supp. 837, 842 (W.D.N.C. 1975);
Solid Rock Foundation, *supra*, 478 F.Supp. at 102.

See also cases discussed under §I.A.1.d, on controversial opinions, dealing with the school's responsibility to restrict those who react disruptively to expression rather than those who are doing the expressing. A school could require, however, that students who distribute literature on school grounds arrange to have receptacles placed nearby and/or that they be responsible for cleaning up the immediate area after distribution.

> Solid Rock Foundation, supra, 478 F.Supp. at 102, 103;
> Vail v. Board of Education of Portsmouth School District, C.A. No. 72-178 (Order and Consent Agreement, 4/18/74) [main opinion at 354 F.Supp. 592 (D.N.H. 1973), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973)].

5. ASSEMBLY

General Principles*

"Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ."

United States Constitution,
Amendment I

As with students' other First Amendment rights, the test for determining whether school authorities may restrict student assemblies, including demonstrations, is whether such restriction is in fact necessary for carrying out the school's normal educational processes without material and substantial disruption -- the standard set out in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), and discussed in §I.A.2.

Grayned v. City of Rockford, 408 U.S. 104 (1972);
Saunders v. Virginia Polytechnic Institute, 417 F.2d 1127 (4th Cir. 1969);
Shamloo v. Mississippi State Board of Trustees, 620 F.2d 516 (5th Cir. 1980);
Gebert v. Hoffman, 336 F.Supp. 694 (E.D.Pa. 1972);
Brubaker v. Moelchert, 405 F.Supp. 837 (W.D.N.C. 1975).

In Grayned, the Supreme Court struck down an anti-picketing ordinance which attempted to seal off the area around a school from protest demonstrations, while it upheld an anti-noise ordinance, as applied within the Tinker guidelines. Several of the Courts' statements provide a framework for analyzing situations in which students assemble.

1. "The right to use a public place for expressive activity may be restricted only for weighty reasons." Grayned, 408 U.S. at 115.

2. "Clearly government has no power to restrict such activity because of its message." Id.

3. "Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant government interests, and are permitted. For example, two parades cannot march on the same street simultaneously, and government may allow only one. . . A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. . .If overamplified loudspeakers assault the citizenry, government may turn them down. . .Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment." Id. at 115-16.

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*Many of the principles discussed in this section have been strongly reaffirmed by a Supreme Court decision issued at press time. N.A.A.C.P. v. Claiborne Hardware Co., ___S.Ct.___, 50 U.S.L.W. 5122 (7/2/82).

4. "Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." Id. at 115-16.

5. "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, . . .making a speech in the reading room almost certainly would. . .The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Id.

6. "Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest." Id. at 116-17.

7. "Expressive activity could certainly be restricted, but only if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" Id. at 118.

8. "Some picketing. . .will be quiet and peaceful, and will in no way disturb the normal functioning of the school. . .On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." Id. at 119.

Cases Finding Assemblies Disruptive

In some cases, evidence of disruption, such as fighting, has justified the school's interference with the assembly or demonstration.

Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977);
Barker v. Hardway, 283 F.Supp. 228 (S.D.W.Va.), aff'd, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969);
Evans v. State Board of Agriculture, 325 F.Supp. 1353 (D.Colo. 1971);
Adibi-Sadeh v. Bee County College, 454 F.Supp. 552 (S.D.Tex. 1978),
Cf.: State v. Ybarra, 550 P.2d 763 (Ore.App. 1976).

Courts have held that sit-ins, building take-overs, or other activities which physically deny access to school facilities are not protected activities.

Farrell v. Joel, 437 F.2d 160 (2nd Cir. 1971);
Herman v. University of South Carolina, 457 F.2d 902 (4th Cir. 1972);
Sill v. Pennsylvania State University, 467 F.2d 463 (3rd Cir. 1972);
Zanders v. Louisiana State Board of Education, 281 F.Supp. 747 (W.D.La. 1968);

French v. Bashful, 303 F.Supp. 1333 (E.D.La. 1969), *modified and aff'd*, 425 F.2d 182 (5th Cir. 1970);
Bistrick v. University of South Carolina, 324 F.Supp. 942 (D.S.C. 1971);
Consejo General de Estudiantes v. Univeristy of Puerto Rico, 325 F.Supp. 453 (D.P.R. 1971);
Haynes v. Dallas County Junior College District, 386 F.Supp. 208 (N.D.Tex. 1974);
State v. Williams, 283 N.W.2d 302 (Ia.Sup.Ct. 1976).

Demonstrations within a classroom which make continuation of the class impossible also fit this general framework.

Furomoto v. Lyman, 362 F.Supp. 1267 (N.D.Cal. 1973);
Commonwealth v. Bohmer, 372 N.E.2d 1381 (Mass. 1978).

Walkouts and Boycotts

Courts have also used the substantial disruption standard to rule against students involved in walkouts and boycotts of classes.

Dunn v. Tyler Independent School District, 460 F.2d 137 (5th Cir. 1972);
Hobson v. Bailey, 309 F.Supp. 1393 (W.D.Tenn. 1970);
Black Students v. Williams, 335 F.Supp. 820 (M.D.Fla. 1972), *aff'd*, 470 F.2d 957 (5th Cir. 1972);
Gebert v. Hoffman, *supra*.
See: *Tate v. Board of Education*, 453 F.2d 957 (8th Cir. 1972) (ruling against students who walked out of an optional pep rally when "Dixie" was played).

While walkouts may, in certain circumstances, be substantially disruptive, it can be argued that courts should not apply the disruption standard in this way to boycotts or to demonstrations involving students who are supposed to be attending classes. The failure to attend class because of a protest should no more be viewed as a substantial disruption of the school than failure to attend because of illness or truancy. Instead, the problem should be treated as violation of school regulations requiring class attendance. Students may be disciplined for this violation, but they should not be singled out for harsher discipline than is dispensed for other unexcused absences. What the students are doing during this unexcused absence, including protesting, is a separate issue, which may be the focus of an independent First Amendment inquiry concerning substantial disruption.*

Responsibility for the Actions of Others in Demonstrations

The question of students' responsibility for the actions of others is particularly important in the context of demonstrations.

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*See *N.A.A.C.P. v. Claiborne Hardware Co.*, *supra*.

First, students cannot be disciplined for being present at the scene of a disruptive demonstration in which they have not participated.[*]

> *Wong v. Hayakawa*, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973);
> *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1001-02 (5th Cir. 1975).

Second, "In deciding this issue [of disruption], we believe that the courts can only consider the conduct of the demonstrators and not the reaction of the audience." *Gebert*, 336 F.Supp. at 697. The court held that (a) the fact that a crowd of other, non-participating students were attracted to and congregated in the halls near the sit-in area, and (b) the fact that administrators left their scheduled duties in order to keep an eye on the demonstration, could not be considered as evidence of disruption. *Id.*

Third, there are questions as to the responsibility of the "leaders" or "planners" of a demonstration for the actions of those who take part. In such cases, the courts may distinguish between students who plan or lead peaceful demonstrations at which others engage in unplanned disruptive action and students who more directly plan, provoke, or lead the disruptive activity itself. Compare *Scoggin v. Lincoln University*, 291 F.Supp. 161 (W.D.Mo. 1968); with *Jenkins*, 506 F.2d at 1001. For further discussion of issues concerning the responsibilities for the actions of others, incitement, etc., see §I.A.1.d. A student engaged in expression is not responsible for the disruptive actions of others, unless he/she uses "fighting words" or "incitement", as narrowly defined in that section.[*]

Reasonable Rules

Students can be disciplined for demonstrations which are not substantially disruptive if they violate other legitimate, published rules of the school. Here, the legal analysis focuses on the reasonableness of the rule. As *Grayned* makes clear, the rules cannot regulate the content of the expression. They can, under *Grayned*, regulate the time, place, and manner of the demonstration, but must be narrowly drawn for the purpose of preventing substantial disruption. Regulations which are drawn in a way which also tends to hinder non-disruptive demonstrations would thus be overbroad. If the rule is sufficiently narrow in this sense, a court will generally sustain discipline of students who violate it even though this particular violation did not actually produce substantial disruption. See *Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970), *aff'd. per curiam*, 451 F.2d 561 (5th Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). One court upheld a rule which banned all demonstrations within the school building but permitted them elsewhere on school grounds. Sword v. Fox, 466 F.2d 1091 (4th Cir.), cert. denied, 404 U.S. 994 (1971). Under the above analysis, however, this seems overbroad in that narrower regulations prohibiting demonstrations at certain disruptive places and times in the building could accomplish the purpose of preventing substantial disruption.

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[*] *N.A.A.C.P. v. Claiborne Hardware Co.*, *supra*.

See : Gebert v. Hoffman, supra.
Cf. : U.S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977) (non-school case, noise-control ordinance setting decibel levels struck down as vague and overbroad, citing Saia v. New York, 334 U.S. 558 (1948), and Kovacs v. Cooper, 336 U.S. 77 (1949), on the right to amplify speech short of causing real disturbance and the need for very narrow and precise regulations, lest "annoyance at ideas. . .be cloaked in annoyance at sound," 334 U.S. at 562).

Prior Approval

One type of rule whose reasonableness is open to question is a rule which requires prior approval of demonstrations or permits restraining of demonstrations prior to their occurrence. The commentary to §I.A.4, "Prior Restraint," contains a general discussion of the issue. As that discussion points out, there is a strong presumption against the use of prior restraints, although certain circuits have permitted their use when accompanied by carefully drawn procedures. Compare:

Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C. 1967), and
Marin v. University of Puerto Rico, 377 F.Supp. 613, 626 (D.P.R. 1974), in which courts struck down certain rules as impermissable prior restraints, with
Sword v. Fox, supra.
Cf.: Shamloo, supra.

The Supreme Court, in non-school cases, has held that prior approval or licensing schemes for assemblies, parades, or demonstrations must not allow broad discretion to the decision maker to decide when to grant or deny permission and must instead contain specific standards narrowly limited to those necessary to serve important state interests (e.g., preventing substantial disruption) -- regarding the time, place, and manner of events which will or will not be permitted.

Cox v. New Hampshire, 312 U.S. 569 (1941);
Saia v. New York, 334 U.S. 553 (1948);
Niemotko v. Maryland, 340 U.S. 268 (1951);

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).
See: *Collin v. Smith*, 578 F.2d 1197, 1207-10 (7th Cir. 1978) *cert. denied*, 439 U.S. 916 (1978).

Other procedural requirements applicable to prior restraint schemes, such as those found in *Freedman v. Maryland*, 380 U.S. 51 (1965), which place the burden of justification on the school and require the promptest possible decisions and expedited review, should also be applicable to school assemblies. *Snyder v. Board of Trustees*, 286 F.Supp. 927, 936 (N.D.Ill. 1968). (The *Freedman* requirements are spelled out in comments to §I.A.4.) The procedure should also define "assembly" (otherwise they might apply to a conversation among three students).

One court has distinguished between prior approval and "registration." *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968). A requirement that demonstrations be registered 48 hours in advance was upheld where there was no indication the school would attempt to stop such demonstrations but only desired to work out details in good faith, and the university had made it clear that it would not apply the rule to spontaneous demonstrations. See also *Bayless v. Martine*, *supra*. In *Brubaker v. Moelchert*, *supra*, the court approved revised regulations which permitted assemblies in two areas without prior approval and required prior approval for assemblies in any other place, based upon written request 48 hours in advance, with approval assumed if no answer is received within 36 hours, and right of appeal with a decision required at least six hours before the event. 407 F.Supp. at 842-43, 844.

Cross Reference

See also cases in:
- §I.B.3.a, "Equal Access to Existing Forums;"
- §I.B.3.c, "Right to Invite and Hear Speakers;"
- §I.B.6, "Association -- Student Organizations."

6. ASSOCIATION -- STUDENT ORGANIZATIONS

General Principles *

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, e.g., Baird v. State Board of Arizona, 401 U.S. 1,6 (1971); NAACP v. Button, 371 U.S. 415, 430 . . . (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 . . . (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 . . . (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of campus facilities for meetings and other appropriate purposes."

Healy v. James, 408 U.S. 169, 181 (1972).

" . . . the Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."

N.A.A.C.P. v. Button, 371 U.S. 415, 444-45 (1963).

"As we have indicated at the outset, we see no sanction in reason or law for saying that, absent a direct threat to safety or the enforcement of law, certain groups lack a right of association. Many of the groups whose associational rights have been recognized by the Supreme Court have stood for propositions which must have seemed as outrageous as the GSO's positions must seem to many. See, e.g., Healy v. James, 408 U.S. at 187 . . . ; United States v. Robel, 389 U.S. 258 . . . (1960); DeJonge v. Oregon, 299 U.S. at 353 . . . ."

Gay Students Organization v. Bonner, 509
F.2d 652, 660 n.4 (1st Cir. 1974).

Standard for Restricting Associational Activities

The basic framework for analyzing First Amendment rights applies to the right of association. In order for the school to take any action which restricts protected associational activities, the school bears the burden of proving that the school action serves a compelling, legitimate school interest (in particular, prevention of substantial disruption of educational activity) and that there is no other way of serving that interest which is less restrictive of students' associational activities, and in no event can the activity be restricted because of the contents of the group's message.

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*These general principles have been strongly reaffirmed by a Supreme Court decision issued at press time. N.A.A.C.P. v. Claiborne Hardware Co., ___S.Ct. _____, 50 U.S.L.W. 5122 (7/2/82)

Healy v. James, 408 U.S. at 187-88, 189 n.20;
N.A.A.C.P. v. Alabama, 357 U.S. 449, 463 (1958);
Gay Students Organization, 509 F.2d at 660;
New Left Education Project v. Board of Regents, 326 F.Supp. 158 (W.D.Tex. 1970), *vacated on other grounds*, 404 U.S. 541 (1972) 414 U.S. 807 (1973);
Student Coalition for Gay Rights v. Austin Peay University, 477 F.Supp. 1267, 1272 (M.D.Tenn. 1979).
Cf. *Widmar v. Vincent*, 102 S.Ct. 269 (1981).

This analysis is applied in more detail in the discussion of school recognition of organizations below.

Group-Sponsored Social Activities

Do rights of association apply to groups organized for social purposes? While school officials "may have some latitude in regulating *organizations* such as fraternities or sororities which can be purely social," *Gay Students Organization*, 509 F.2d at 659 (emphasis added), activities conducted by other organizations with First Amendment rights are protected even when they are purely social *events* -- e.g., teas, dinners, parties, dances.

Id. at 659-661;
Wood v. Davision, 351 F.Supp. 543 (N.D.Ga. 1972).
See: *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976).

Such events can be important parts of an organization's associational activities, providing opportunities for publicity, support-gathering, and informal communication. *Gay Students Organization*, *supra*.

Further, "Indeed, there is some support for the proposition that dancing is itself a form of expression protected by the First Amendment. *See* Salem Inn, Inc. v. Frank, 501 F.2d 18,20 (2d Cir. 1974) [*aff'd in part*, 422 U.S. 922 (1975)]; *cf*. California v. LaRue, 409 U.S. 109,118 (1972)." *Id*. at 661 n.5. See also:

Fricke v. Lynch, 491 F.Supp. 381, 385 (D.N.H. 1980)(First Amendment protects right of male high school student to bring another male to senior prom);
Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (First Amendment protects entertainment, including nude dancing).

Interscholastic Extracurricular Activities

Extracurricular activities which are affiliated with interschool associations (e.g., interscholastic athletic teams, National Honor Society, debate teams) generally are bound by a set of regulations formulated by non-students. So long as these regulations are reasonable and not discriminatory or violative of other rights, they are likely to be upheld (although challenges to such regulations have rarely been based on First Amendment grounds). Thus, to some extent, students choosing to participate in such groups will not have as much democratic control over the organization as is guaranteed to more localized and student-initiated activities. See *ABC League v. Missouri State High School Activities Ass'n*, 530 F.Supp. 1033, 1046 (E.D.Mo. 1981)(right of association not impinged by interscholastic eligbility rules because some regulation to insure a uniform statewide program is proper, but transfer regulation was nevertheless struck down under lesser standard as arbitrary and capricious. See also discussion of "Membership Rules," below.

School Funding of Organizational Activities

Allocation of school funds must not be done in a manner which discriminates against organizations because of their viewpoints, discourages expression, or violates other First Amendment principles. See cases cited below concerning "registration" or "recognition" requirements. Cf:

Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 849 (S.D.Cal. 1976)(denial of organization's request to engage in fund raising activity available to other organizations violated equal protection);

Cases cited in §I.B.4.a, "Official Student Publications."

But cf.:

Maryland Public Interest Group v. Elkins, 565 F.2d 864 (4th Cir. 1977), *cert. denied*, 98 S.Ct. 1879 (1978)(school could require that funds received from the institution not be used for litigation where group was still free to use non-school funds for litigation and had access to lawyers and the school would continue to provide substantial funds for the group for other purposes even if it used its non-school funds for litigation).

"Registration" or "Recognition" Requirements

Schools can, and often do, require that student organizations register as a condition of obtaining benefits which are not otherwise available to students individually or collectively -- school funds, office space, and *regular* meeting space. Thus, by registering, a group would not only have the same rights as other students to meet at an available, non-disruptive time and place. It would also be assured of the availability of such a place on a regular basis. See:

Gay Alliance of Students v. Matthews, 544 F.2d 162, 165 (4th Cir. 1976) (fact that non-recognized groups had some access to school facilities cannot justify refusal to recognize a group where recognition, which had been granted to certain other organizations, conferred additional privileges and rights);

American Civil Liberties Union v. Radford College, 315 F.Supp. 893, 895, 896-97 (W.D.Va. 1970)(similar holding);

Brubaker v. Moelchert, 405 F.Supp. 837, 840-41 (W.D.N.C. 1975) (improper to allow only sponsored groups to use facilities for meetings).

Courts have noted that, in schools which use a recognition system, denial of recognition usually places significant limitations on a group's freedom of association.

Healy v. James, 408 U.S. 169, 176, 181-82 (1972) (see quote at beginning of this section);

University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi, 452 F.2d 564 (5th Cir. 1971);

Gay Alliance of Students v. Matthews, 544 F.2d 162, 163-65 (4th Cir. 1976) (inclusion in directory, financial consultation, building use, eligibility for funding);

Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 98 S.Ct. 1276 (1978) *reh. denied*, 435 U.S. 981 (1978) (facilities and funding);

Aman v. Handler, 653 F.2d 41, 44 (1st Cir. 1981);

Student Coalition for Gay Rights v. Austin Peay University, 477 F.Supp. 1267, 1272 (M.D.Tenn. 1979) (meeting facilities, mailing and post-office box privileges, various advertising and publicity opportunities, school funding).

Where that is the case, the burden is on the school to justify a denial of recognition, and this burden is a "heavy" one. *Healy*, 408 U.S. at 184. (See comments in lead paragraph for nature of the burden). Administrative disagreement with the group's views or goals is not sufficient, even if "abhorrent." *Id*. at 187-88. Thus, courts have refused to accept the school's contention that recognition could be denied because the group advocated "a philosophy of 'destruction,'" *id*. at 187; "advocate[d] 'controversial' ideas or . . . ' stresse [d] one side' of issues," *Dixon v. Beresh*, 361 F.Supp. 253, 254 (E.D.Mich. 1973) (high school); allegedly had a "role and purpose. . . basically outside the scope and objectives of this. . .institution," *American Civil Liberties Union v. Radford College*, 315 F.Supp. 893, 898 (W.D.Va. 1970); or would attract students to an organization which "may have adverse consequences for some individuals involved," *Gay Alliance of Students*, 544 F.2d at 165.

See: *Student Coalition for Gay Rights*, 477 F.Supp. at 1273-74;
Aman v. Handler, *supra*.

cf. *Widmar v. Vincent*, *supra* (student religious group had free speech and association right to meet in university facilities on same terms as non-religious student groups; no establishment of religion).

Compare:

Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43 (Ct.App. 1977), *cert. denied*, 434 U.S. 877 (1977) (recognition of Bible study club would be establishment of religion in violation of First Amendment);

Brandon v. Board of Education, 487 F.Supp. 1219 (N.D.N.Y. 1980), *aff'd*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 102 S.Ct. 970 (1981) (prayer sessions in classrooms before start of classes would be unconstitutional establishment of religion; *Widmar* distinguishes this case on grounds that here the students were seeking, on freedom of religion grounds, to use a forum *not* available to other student groups, 102 S.Ct. 276 at n.13).

Under *Healy*, recognition can legitimately be withheld from groups that engage in activity which is illegal, in violation of valid school rules, or substantially and materially disruptive. 408 U.S. at 188-94. In making this determination, the school must follow the "distinction between advocacy and action":

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy [of the use of force or of law violation"] and advocacy *directed to* inciting or producing *imminent* lawless action *and* . . . *likely to* incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 . . . (1969) (unanimous *per curiam* opinion). [*Healy*, 408 U.S. at 188 (emphasis added).]

See also comments to §I.A.1.d. on incitement. The school's decision must be based on factual, "substantial evidence" of the "likelihood" of such activity and not on "undifferentiated fear or apprehension of disturbance." *Id.* at 188-91. Even then, denial of recognition would be proper only *where* there is no available less restrictive way of preventing the harm. *Id.* at 189 n.20. For application of these principles, compare:

University of Southern Mississippi, *supra*;
National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973);
Gay Students Organization v. Bonner, 509 F.2d 652, 662-63 (1st Cir.1974);
Gay Alliance of Students, *supra*, 544 F.2d at 166;
Gay Lib v. University of Missouri, supra, 558 F.2d at 853-56;

Aman, *supra*;
Snyder v. Board of Trustees, 286 F.Supp. 927 (N.D.Ill. 1968);
Dixon, *supra*;
Student Coalition for Gay Rights, *supra*, 477 F.Supp. at 1273-74;

with:
Merkey v. Board of Regents, 344 F.Supp. 1296, 1307 (N.D.Fla. 1972), *vacated as moot*, 493 F.2d 790 (5th Cir. 1974)(group was set for "immediate action" which posed "imminent danger to the university").

Groups which are denied recognition while other groups are granted it may also have an equal protection claim, even if denial of the benefits of recognition is not fatal to effective association. See:

American Civil Liberties Union, 315 F.Supp. at 896-98;
Gay Alliance of Students, 544 F.2d at 167.
Cf. *Gay Students Organization*, 509 F.2d at 662 n.6.

A school may require that organizations seeking recognition affirm their willingness to abide by the school's reasonable rules. *Healy*, 408 U.S. at 193.

Requiring Disclosure of Membership Lists

"This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

N.A.A.C.P. v. Alabama 357 U.S. 449, 462 (1958)

See also:

Shelton v. Tucker, 364 U.S. 479 (1960);
Buckley v. Valeo 424 U.S. 1 (1976);
Paton v. La Prade, 469 F.Supp 773, 778 (D.N.J. 1978) (high school student "had a right to receive her requested information [from Socialist Workers Party] free of government interference and to remain anonymous in her request for political information;" FBI file improper).

The disclosure of the membership lists may be distinguishable from disclosure of the names of one or more contact people so that the school may have some way of protecting its facilities. See Eisen v. Regents of University of California, 269 Cal.App.2d 696, 75 Cal.Rptr. 45 (Ct.App. 1969), which upheld disclosure of officers' names as a condition of recognition on this theory. The Court in N.A.A.C.P. noted that the organization had not objected to disclosing the names of members who were employed by or held official positions with it. 357 U.S. at 464.

In an actual court case, students would probably need to make a showing that disclosure of membership would be likely to adversely affect association. In N.A.A.C.P., plaintiffs presented evidence of reprisal and public hostility, which the Court found likely to have an adverse effect because "it may induce members to withdraw from the Association and dissuade others from joining it." 357 U.S. at 462-63. The school would also have an opportunity to convince the court that there is a "compelling" interest in the disclosure, which cannot be served in any other manner. See:

N.A.A.C.P., 357 U.S. at 463;
Eisen, supra;
Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (striking down statute allowing county judge to require disclosure of membership lists of organizations which he considered to be engaged in activities designed to interfere with peaceful operation of schools; although statute found to serve compelling interest of deterring disruptive activity, it sweeps too broadly by not being limited to knowing membership in groups openly avowing unlawful goals).

See also discussion of anonymous expression in §I.B.9.

Affiliation with Outside Organizations

"From the outset the controversy in this case has centered in large measure around the relationship, if any, between petitioners' group and the National SDS. . . . Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, *e.g.*, United States v. Robel, 389 U.S. 258 . . . (1967); Keyishian v. Board of Regents, 385 U.S. at 604-610 . . . ; Elfbrandt v. Russell, 384 U.S. 11 . . . (1966); Scales v. United States, 367 U.S. 203 . . . (1961). In these cases it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissable basis upon which to deny First Amendment rights. United States v. Robel, supra, 389 U.S., at 265 . . . . The Government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."

Healy v. James, 408 U.S. 169, 185-86 (1972).[*]

Cf: *Dixon v. Beresh*, 361 F.Supp. 253 (E.D.Mich. 1973);
Cintron v. State Board of Education, 384 F.Supp. 674, 679 (D.P.R. 1974).

Faculty Advisor Requirements

School regulations and requirements are subject to judicial scrutiny (under the framework described in the comments to the lead paragraph) whenever they have the *effect* of restricting associational activity, regardless of whether that is their purpose. See:

N.A.A.C.P. v. Alabama, 357 U.S. 449, 461 (1958);
Healy v. James 408 U.S. 169, 183 (1972);
Gay Students Organization v. Bonner, 509 F.2d 652, 658-59 (1st Cir. 1974);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 848 (S.D.Cal. 1976);
Reineke v. Cobb County School District, 484 F.Supp. 1252 (N.D.Ga. 1980).

This would apply to an otherwise reasonable advisor requirement if it operates to deny or restrict meaningful association by a legitimate organization -- for instance, if teacher cutbacks make an advisor unavailable or if the organization finds itself saddled with an advisor who is unsupportive and stands in the way of the organization's attempts to further its own ends or otherwise attempts to control student expression.

First Amendment Rights of All Organizations -- Registered or Unregistered

All students, whether acting in groups or individually, have certain First Amendment rights which cannot be tied to recognition requirements -- such as the right to distribute literature, to assemble in a non-disruptive manner, or to make use of student bulletin boards. A group of students who come together on an ad hoc or short-term basis cannot be required, for instance, to submit bylaws and obtain an advisor before exercising these rights. Recognition requirements can only be used as a condition to additional rights, such as school funding or office space.

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[*] *N.A.A.C.P. v. Claiborne Hardware Co.*, *supra*.

Organizations' First Amendment rights flow from two complementary sources. Courts have discussed them both as basic to effective exercise of freedom of association and as independent rights of speech, assembly, etc. See:

Healy v. James, 408 U.S. 169, 181-82 (1972);
Widmar v. Vincent, supra, 102 S.Ct. at 276 n.13;
National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973);
Gay Students Organization v. Bonner, 509 F.2d 652, 659-62 (1st Cir 1974);
Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976);
American Civil Liberties Union v. Radford College, 315 F.Supp. 893, 896 (W.D.Va 1970);
New Left Education Project v. Board of Regents, 326 F.Supp. 158 163 (W.D.Tex. 1970), vacated on other grounds, 404 U.S. 541 (1972), 414 U.S. 807 (1973);
Wood v. Davison, 351 F.Supp 543 (N.D.Ga. 1972);
Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 848-49 (S.D. Cal. 1976);
Brubaker v. Moelchert, 405 F.Supp 837 (W.D.N.C. 1975).

Note also the number of cases which involve groups throughout the commentary to other rights of freedom of expression.

Due Process for Organizations

The organization's right to a procedurally fair determination before being banned or disciplined is a necessary corollary of the school's heavy burden of justifying restrictions of free association. See:

University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi, 452 F.2d 564, 567 (5th Cir. 1971).
Cf: N.A.A.C.P. v. Alabama, 357 U.S. 449, 463 (1958);
Healy v. James, 408 U.S. 169, 184 (1972);
Merkey v. Board of Regents, 344 F.Supp. 1296, 1304 (N.D.Fla. 1972), vacated as moot, 493 F.2d 790 (5th Cir. 1974).

For a good discussion of the right of organizations to assert due process rights -- both on behalf of their individual members and on their own behalf -- where First Amendment rights are involved, see Blawis v. Bolin, 358 F.Supp. 349, 354-55 (D.Ariz. 1973).

The issue addressed here -- restrictions upon the organization -- is distinct from the issue of due process for students who are punished by being denied participation in extracurricular organizations, which is addressed in the due process section, §X.F.

School Legal Responsibility for Organization's Actions

The school cannot base restrictions of student organizations on a claim that use of school facilities makes the school legally responsible for the actions of the group.

National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016-17 (4th Cir. 1973);
Gay Alliance of Students v. Matthews, 544 F.2d 162, 165 (4th Cir. 1976);
Antonelli v. Hammond, 308 F.Supp. 1329, 13 (D. Mass. 1970);
Arrington v. Taylor, 380 F.Supp. 1348, 1359-62 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 96 S.Ct. 1111 (1976).
Cf.: *Widmar v. Vincent*, *supra*, 102 S.Ct. at 276.
Galda v. Bloustein, 516 F.Supp. 1142, 1149 (D.N.J. 1981).

It can, however, refuse to take actions which *would* constitute official endorsement. *Associated Students of Western Kentucky v. Downing*, 475 F.2d 1132 (6th Cir. 1973). And it can require groups to issue a disclaimer clause stating that the organization is not speaking for the school.

Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973);
Koppell v. Levine, 347 F.Supp. 456, 460 (E.D.N.Y. 1972).

Membership Rules

Despite the fact that student organizations are protected in their expressive activities against interference by school officials, they can nevertheless be required to maintain non-discriminatory membership policies, at least if they are "school-sponsored" or "recognized" (e.g., receive funds). See also discussion of school paper's duty to accept advertisment of differing viewpoints, §I.B.4.a. Groups which are not school-sponsored can probably be required at least to conduct all on-campus activity in a non-discriminatory manner. See:

Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978) (Klan's right of access to school as public forum to hold meeting, despite discriminatory membership policies, where meeting was open to all);
National Socialist White People's Party, *supra* (similar ruling).

For restrictions of membership and participation based on *sex*, *race*, *religion*, *national origin*, and *economic class*, see §III. For the legality of rules regulating participation on the basis of *marriage*, *parenthood*, or *pregnancy*, see §VII.C. For regulations based on *physical conditions* or *handicaps*, see §III.C.1.For rules limiting participation because of *appearance*, see §VII.A. For limitations because of *misconduct*, see §VIII.F (substantive rights) and §X.F (procedural rights).

Athletic eligibility rules which are not based on any of the above criteria have generally been held to be reasonable by courts, although these cases have rarely raised First Amendment claims. For rules barring competition for a certain period after a student has transferred , see:

Scott v. Kilpatrick, 237 So. 2d 652 (Ala. 1970);
Sturrup v. Mahan, 305 N.E.2d 877 (Ind. 1974);
Sanders v. Louisiana High School Athletic Ass'n, 242 So.2d 19 (La. App. 1970);
Chabert v. Louisiana High School Athletic Ass'n, 323 So.2d 774 (La. 1975);
Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981);
Bruce v. South Carolina High School League, 189 S.E.2d 871 (S.C. 1972);
Albach v. Odle, 531 F.2d 983 (10th Cir. 1976);
Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81 (4th Cir. 1978);
Kulovitz v. Illinois High School Association, 462 F.Supp. 875 (N.D.Ill. 1978);
Williams v. Hamilton, 497 F.Supp. 641 (D.N.H. 1980);
Barnhorst v. Missouri State High School Activities Association, 504 F.Supp. 449 (W.D.Mo. 1980);
Genusa v. Holy Cross College, Inc., 389 So.2d 908 (La.App. 1980);
Mozingo v. Oklahoma School Activities Association, 575 P.2d 1379 (Okla App. 1978);
Sullivan v. University Interscholastic League, 599 S.W.2d 860 (Tex. Civ. App. 1980).

Cf.: *United States v. Jefferson County Board of Education*, 372 F.2d 836, 899 (5th Cir. 1966) (rule may not be applied to students transferred under desegregation plan);
Hebert v. Ventetuolo, 638 F.2d 5 (1st Cir. 1981).

Compare:
ABC League v. Missouri State High School Activities Assn., 550 F.Supp. 1033 (E.D.Mo. 1980).

For rules setting limits to years of eligibility, see:

Howard University v. N.C.A.A., 510 F.2d 213, 221 (D.C.Cir. 1975);
Dallam v. Cumberland Valley School District, 391 F.Supp. 358 (M.D.Pa. 1975);
Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377 (M.D.N.C. 1975);
Fluitt v. University of Nebraska, 489 F.Supp. 1194 (D.Neb. 1980);
Blue v. University Scholastic League, 503 F.Supp. 1030 (N.D.Tex. 1980);
Smith v. Crim, 240 Ga. 390, 240 S.E.2d 884 (1977).

But see:
Florida High School Activities Ass'n v. Bryant, 313 So.2d 57 (Fla. App., 3rd Dist., 1975) (declaring that plaintiff should have been exempted from four-year eligibility rule).

For rules limiting off-season and independent team play, see:

Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981);
Dumez v. Louisiana High School Athletic Ass'n, 334 So.2d 494
(La.App., 1st Cir. 1976);
Art Gaines Baseball Camp, Inc. v. Houston, 400 S.W.2d 735 (Mo. 1973).
Cf.: §VII.B, "Outside Activities."

For a rule terminating eligibility once a student signs a professional contract, see Shelton v. N.C.A.A., 539 F.2d 1197 (9th Cir. 1976). However, a rule which ends eligibility for a foreign student who competes in a meet in a foreign country was struck down because it established a suspect classification based on alienage which was not sufficiently justified.

Howard University, 510 F.2d at 222.

See: Buckton v. N.C.A.A., 366 F.Supp. 1152 (D.Mass. 1973)(invalid alienage classification).

At the college level, minimum grade-point average requirements established by athletic associations have been upheld in:

Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974);
Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975);
Shubert v. N.C.A.A., 506 F.2d 1402 (7th Cir. 1974);
Howard University v. N.C.A.A., 510 F.2d 213 (D.C.Cir. 1975).
See: Sellman v. Baruch College, 482 F.Supp. 475 (S.D.N.Y. 1979)(upholding student constitution provision requiring registration for at least 12 credits and a grade point average of 2.5 as qualifications for student government positions).

In finding the rule reasonable, however, courts have generally emphasized the need to insure that colleges do not recruit athletes who are not really students and who have no realistic chance of obtaining degrees. This is generally not an issue in public elementary and secondary schools, where students generally attend under compulsory laws and/or on the basis of their residence. Further, excluding students with lower grades from extracurricular participation may aggravate divisions within the student body and increase the degree to which certain groups are stigmatized as outcasts. Compare Sellman, supra, 482 F.Supp. at 479-80 (student failed to provide any evidence to support claim of racial discrimination, such as evidence that the policy disqualified a disproportionate number of minority students).

Grade point average requirements may be particularly subject to challenge when applied to student government activities, both because the disenfranchisement and isolation of certain groups whose averages tend to be lower is particularly harmful here and because the student body itself, over and above the individual, may have a claim that its First Amendment rights of association are being infringed by not allowing it to structure its government in the way it chooses, including the right to be represented by the students of its choice. In contrast, the eligibility rules in Sellman, supra, were adopted by the student body itself. Further, the court focused mainly on the credit requirement, which is more justifiable in limiting eligibility to those students who spend a significant portion of time at the school.

State courts have generally upheld the school's right to forbid student membership in fraternities, sororities, and other secret societies on the theory that they are undemocratic, undermine discipline, promote defiance, engage in harmful hazing, and/or result in underachievement.

Bradford v. Board of Education, 18 Cal.App. 19, 121 P. 929 (1912);
Satan Fraternity v. Board of Public Instruction, 155 Fla. 222, 22 So.2d 892 (1945);
Antell v. Stokes, 287 Mass. 103, 191 N.E.407 (1934);
Steele v. Sexton, 253 Mich. 32, 234 N.W. 436 (1931);
Holroyd v. Eibling, 116 Ohio App. 440, 188 N.E.2d 797 (1962);
Burkitt v. School District No. 1, 195 Or. 471, 246 P.2d 566 (1952);
Passel v. Fort Worth Independent School District, 453 S.W.2d 888 (Tex.Civ.App. 1970), cert. denied, 402 U.S. 968 (1971);
Wayland v. Board of School Directors, 43 Wash. 441, 86 P. 642 (1906).

The Supreme Court has also upheld such bans, but neither case involved students who were required to attend school because of compulsory education laws.

Waugh v. Board of Trustees, 237 U.S. 589 (1915);
Hughes v. Caddo Parish School Board, 57 F.Supp. 508 (W.D.La. 1944), aff'd, 323 U.S. 685 (1945).

The results reached in these decisions may still be valid, but the reasoning process seems somewhat deficient in that they have not seriously confronted First Amendment associational claims. Nor have they generally addressed legal arguments against regulation of off-campus behavior. (See §VII.B.) But see:

Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43 (1922) (court struck down a secret society ban, declaring that the school's authority did not extend to the student once he/she reached home unless his/her actions actually affected school discipline; the evidence the school produced concerning the effect of membership on school discipline was not sufficient);
Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex. Civ.App. 1945)(ban on fraternity members' participation in extracurricular activities may not apply to fraternity membership during vacations).

Cf. National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973)(school must make its meeting facilities available to an outside group with a discriminatory membership policy on the same basis as any other outside group where the meeting was open to all).

7. RIGHT TO PETITION

"Congress shall make no law. . .abridging the right of the people . . .to petition the Government for a redress of grievances."

United States Constitution, Amendment I

"We would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of significant grievances."

Grayned v. City of Rockford, 408 U.S. 104, 118 (1972)

"The same philosophy governs the approach of citizens or groups of them to administrative agencies. . .and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)

See also:

N.A.A.C.P. v. Button, 371 U.S. 415 (1963);
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969);
Discussion of retaliation for exercising First Amendment rights (e.g., for complaining or suing) in §I.C.

8. FREEDOM OF CONSCIENCE -- FLAG CEREMONIES, ETC.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

West Virginia State Board of Education
v. Barnette, 319 U.S. 624, 642 (1943)

Other cases recognizing the right not to participate in flag salutes and similar exercises include:

Russo v. Central School District No. 1, 469 F.2d 623 (2nd Cir.), cert. denied, 411 U.S. 932 (1973);
Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973);
Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978);
Frain v. Barron, 307 F.Supp. 27 (E.D.N.Y. 1969);
Banks v. Board of Public Instruction, 314 F.Supp. 285 (S.D.Fla. 1970), aff'd, 450 F.2d 1103 (5th Cir. 1971);
Hanover v. Northrup, 325 F.Supp. 170 (D.Conn. 1970);
Opinions of the Justices to the Governor, 363 N.E.2d 251 (Mass. 1977) (statute requiring teachers to lead pledge unconstitutional);
State v. Lundquist, 262 Md. 531, 278 A.2d 263 (1963);
Sheldon v. Fannin, 221 F.Supp. 766 (D.Ariz. 1963) (national anthem).

As Goetz, Lipp, Banks, and Sheldon point out, standing is an integral part of the process of showing acceptance, and it can no more be required than the recitation of the words. Students may simply sit quietly (or, perhaps, leave the room in a non-disruptive manner).

In Wooley v. Maynard, 97 S.Ct. 1428 (1977), the Supreme Court held that New Hampshire citizens could not be required to display the ideological state motto, "Live Free or Die," on their license plates. Under the reasoning of this case, it is a violation of a student's right of freedom of thought -- which includes "the right to refrain from speaking"-- for the school to make a requirement "which forces an individual as part of his daily life. . .to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." unless there is a compelling, legitimate state reason to do so and there is no less drastic means of serving that purpose. 97 S.Ct. at 1435, 1436. Further, "where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." 97 S.Ct. at 1436. The principles of this case would arguably apply to situations where a school requires students to wear clothing or carry articles which display ideological messages.

Compare Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980), where the court held that a college student could be barred from an advanced Army Reserve Officers' Training (ROTC) course on the grounds that his avowed Nazi sympathies, belief in white supremacy and statement that blacks and Jews should be deported were incompatible with the necessity to obey commands, particularly from those he regarded as socially inferior, and negated his ability to provide effective leadership. The court emphasized that this was a very narrow ruling in an unusual case which met the standards of strict scrutiny.

See also §II, "First Amendment -- Religion."

9. ANONYMOUS EXPRESSION

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . .Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."

Talley v. California, 362 U.S. 60, 64-65 (1960)

In Talley, the Supreme Court held that an ordinance forbidding distribution of handbills without the name and address of the writer and the distributor was invalid, finding that it chilled free expression without a sufficiently weighty reason. (The Court rejected the argument that a broad identification requirement was a proper way to deal with fraud, false advertising, and libel). Identification requirements for distribution of literature in school laws have been declared illegal in Jacobs v. Board of School Commissioners, 490 F.2d 601, 607 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975); and were conceded to be unconstitutional in Rowe v. Campbell Union High School District, C.A. No. 51060 (N.D. Cal., Nov. 10, 1970). On the other hand, requiring the listing of names of authors, publishers, editors, and contributing writers was upheld as an element of "responsible journalism," without even mentioning Talley, in Matter of Schiener, 11 Ed.Dept.Rep. 293, 294-95 (N.Y.Ed.Comm'r 1972).

Talley makes it clear that an identification requirement for distribution of unofficial literature is invalid unless it is justified by some overriding, legitimate interest which is unrelated to suppressing free expression and which cannot be served through any less restrictive means.

In Aryan v. Mackey, 462 F.Supp. 90,92 (N.D.Tex. 1978), Iranian students demonstrating against the Shah wished to wear masks, in part because otherwise they would be afraid of reprisals by the Shah's agents. The court held that anonymity here was linked to the ability to engage in protected expression, and the school's fears of violence resulting from the masks were not sufficiently justified by concrete evidence, using the same standards as Talley. This court further upheld the masks themselves as protected symbolic expression, since they were also worn as a sign of opposition to the Shah.

In *Spartacus Youth League v. Board of Trustees*, 502 F.2d 789, 803-04 (N.D.Ill. 1980), the court applied *Talley* and held that a requirement that literature must identify the name of the person or organization that issued it was justified because of the university's *specific* historical experience of fraud in literature distribution,where plaintiffs made no showing of harm. On the other hand, the court struck down a requirement that the individual distributor be identified, despite the university's concern about misappropriation of funds.

In *Galda v. Bloustein*, 516 F.Supp. 1142, 1148-49 (D.N.J. 1981), the court found that a refund procedure, whereby students who did *not* wish to be charged a fee for support of a student public interest organization had to apply for a refund, did not violate their First Amendment rights concerning protection of their identities.

Since the use of school-controlled media facilities is subject to reasonable regulations of time, place, manner, and expense (see §I.B.3) and the school has an interest in safeguarding its equipment from damage, there may be sufficient justification to require identification of those students who are using that equipment. See *Brooks v. Auburn University*, 296 F.Supp. 188, 195 (M.D.Ala. 1969), *aff'd*, 412 F.2d 1171 (5th Cir. 1973), where the court stated that an organization sponsoring a speaker could be required to submit "sufficient information to enable university officials an orderly means of allocating facilities." On the other hand, students who wish to remain anonymous are free to express themselves in the school through means which do not require the use of school-controlled media, such as through distribution of unofficial literature.

For more on anonymity, see Center for Law and Education, *The Constitutional Rights of Students*, 60-61 (1976). See also *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462-64 (1958), concerning anonymous membership and the discussion of required disclosure of membership lists in §I.B.6, "Associations -- Student Organizations."

C. RETALIATION FOR EXERCISING FIRST AMENDMENT RIGHTS (e.g., FOR SUING OR COMPLAINING)

Students and parents who are wrongly treated are often reluctant to speak out, obtain legal help, complain, organize other students and parents, or take other action protected by the First Amendment -- often because they recognize that the school has many ways, subtle and unsubtle, to retaliate, such as suspension, transfer, lowering of grades, or a poor recommendation for college or employment.

The First Amendment does not only prohibit direct interference with protected expression. It also prohibits more subtle forms of punishment or threats motivated by a desire to inhibit expression. For instance, in Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D. Mass. 4/6/72), the court's injunction included a prohibition against:

> suspending, punishing, intimidating, harassing, or threatening to punish or discipline plaintiff Stephen Mello and other students in the New Bedford public schools for the orderly distribution without substantial disruption or reception within the public schools of papers, newsletters, or other forms of written expression.

In Brennan v. Redmond, C.A. No. 74-C-1163 (N.D. Ill. 2/11/77) (Clearinghouse No. 21,637), a student alleged that she was not permitted to run for senior class president because of her activities with an alternative newspaper. In denying summary judgment, the court stated,

> Of course, defendants Maslow and Silber deny plaintiff's charges. In addition, they take the position that their conduct was not actionable because plaintiff did not have a "constitutional right" to run for class office and that, in any event, the controversy is moot because plaintiff's name was put on the ballot following an order by the Court of Appeals reversing an earlier denial here of plaintiff's motion for a preliminary injunction.
>
> Plaintiff does have a constitutional right not to suffer reprisals at the hands of public school officials because of her exercise of First Amendment rights. Tinker v. Des Moines Independent School District, 393 U.S. 503 (1968). Furthermore, it is undisputed that following the reversal by the Court of Appeals, while plaintiff's name was put on the ballot, her name and qualifications were not included in the pre-election materials prepared and distributed by school officials.

> The Court of Appeals held that plaintiff's testimony, if credited, "established a prima facie case of denial of a privilege in retaliation for the exercise of her First Amendment rights. The burden is therefore upon the defendants to establish that their refusal to certify her candidacy either: (1) was not predicated on the exercise of her First Amendment rights; or (2) was predicated on independent sufficient reasons which can be stated in an understandable form. Until the defendants prove either of those alternatives to the satisfaction of the district court, and the district court expressly so finds,... " defendants' conduct is actionable. That holding is the law of the case and it places on defendants the burden of persuasion should plaintiff's testimony again be credited by the finder of fact at a trial on the merits. Certainly defendants' burden cannot be satisfied summarily in the context of this case because it involves defendants' credibility as witnesses. Therefore, defendants' motion for summary judgment on count 2 is denied.

Similarly, in Pelley v. Fraser, C.A. No. B-76-C-14 (E.D. Ark. 5/18/76) (Clearinghouse No. 19,518), the court granted a preliminary injunction where a student was removed from the student council for responding to an English assignment to write a poem "as Chaucer would have written it" by writing a poem clearly directed at the school's principal and "notable only for its crude language and bad taste."

In Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977), the court held that a school counselor/psychologist had demonstrated that her transfer was at least partially motivated by her complaints that bilingual children were being misplaced in special education classes because of failure to test them in their native language and her advising parents to pursue legal action, and that the First Amendment prohibits transfers to be made on such a basis. See Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976) (similar analysis concerning decision not to reappoint teacher allegedly based on his angry speech during faculty meeting).

Cf.: Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1149-50 and n.7 (4th Cir. 1981) (expulsion of white student from private school for alleged romantic involvement with black student and for student's father's complaining to N.A.A.C.P. violated 42 U.S.C. §1981, a civil rights statute);

Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1353-55 (9th Cir. 1981)(college student could pursue claim against school officials under that portion of 42 U.S.C. §1985(2) which prohibits conspiracy to intimidate court witnesses from freely testifying;

Ross v. Allen, 515 F.Supp. 972, 976 (S.D.N.Y. 1981)(school psychologist had standing under §504 of the Rehabilitation Act, although not under the Education for All Handicapped Children Act, to claim that §504 protected her from being fired in retaliation for reporting alleged violations of the Act and advising parent and student of their rights).

See also cases protecting student editors against wrongful dismissal. §I.B.4.a.

Among the rights protected against such reprisal by the First Amendment -- in addition to the rights of speech, press, assembly, association, and petition or complaint discussed above -- is the right to petition, which includes both the right to complain to school officials and other agencies and the right of access to courts by filing lawsuits. See §I.B.7, "Right to Petition."

As students and parents will readily recognize, it can often be quite difficult to prove that the school's action was motivated by the desire to inhibit expression. Moreover, while the student need only prove that he/she was engaged in protected conduct and that this was at least one motivating factor, and he/she need not prove that it was the sole factor, the school may still have the opportunity to prove that it would have reached the same decision even in the absence of the protected conduct. See:

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) (teacher dismissal case);

Bernasconi v. Tempe Elementary School District No. 3, supra;

Brennan v. Redmond, supra.

Nevertheless, the problem is similar to difficulties in proving motive in any other court case, and it is not always insurmountable.

II. FIRST AMENDMENT -- RELIGION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."
United States Constitution, Amendment I

It is important to distinguish between the "establishment" clause and the "free exercise" clause. A practice which is not in violation of the "free exercise" clause because it is voluntary and does not limit any person's freedom to practice or not practice religion as he/she chooses may still violate the "establishment" clause because it improperly involves the state in religion.

The "establishment clause" cases are beyond the scope of this manual, since they generally do not relate to disciplinary incidents. In general, these cases prohibit school prayer or other school sponsorship of religious practices; overturn statutes which restrict the teaching of certain subjects on religious grounds, such as statutes which forbid the teaching of evolution; prohibit teaching which attempts to foster biblical or religious beliefs, as distinguished from the study of religions from a neutral literary and historic viewpoint; permit release-time programs under which students are excused for religious instruction, so long as school facilities, funds, or other aid is not involved; and set standards for the degree to which the state may fund programs or facilities used by students in private religious schools. See Center for Law and Education, The Constitutional Rights of Students, 25-32 (1976).

The "free exercise" clause may have more implications for discipline, as when schools attempt to punish students who opt out of certain secular school activities on the grounds that the activities conflict with their religious beliefs.

Courts have generally rejected parent or student challenges to courses and textbooks offensive to their religious beliefs.

Wright v. Houston Independent School District, 366 F.Supp. 1208, aff'd 486 F.2d 137 (5th Cir. 1973) (rejecting student challenge to teaching of evolution without also presenting Biblical version);
Davis v. Page, 385 F.Supp. 395 (D.N.H. 1974) (rejecting parent challenge to their children's exposure to sex education course and to audio-visual materials for educational purposes);
Williams v. Board of Education of County of Kanawha, 388 F.Supp. 93 (S.D.W.Va. 1975), aff'd, 530 F.2d 972 (4th Cir. 1975) (rejecting parent challenge to textbooks);
Citizens for Parental Rights v. San Mateo County Board of Education, 124 Cal. Rep. 68, 51 Cal.App.3d 1 (Cal.Ct.App., 1st Dist., Div. 2,

1975), *appeal dismissed*, 96 S.Ct. 1502 (1976) (rejecting challenge to family life and sex education programs);

In re Balogh and Cuzdey, 16 Ed.Dept.Rep. 61, Dec. No. 9301 (N.Y.Ed.Comm'r 1976) (rejecting challenge to sixth grade social studies course, "Man: A Course of Studies").

Cf. *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (1973) (college-funded student newspaper could not be suppressed because of articles harshly critical of certain religious views).

But see:

Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (upholding high school student's right, under the "free exercise" clause, to refuse to participate in R.O.T.C. because of religious beliefs);

Moody v. Cronin, 484 F.Supp. 270 (C.D.Ill. 1979) (upholding student's objection to gym class clothing requirements because of conflict with religious prohibition of immodest apparel; state failed to employ the least restrictive alternative for achieving its interests).

But Cf.:

Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right of Amish to remove their children from public schools after eighth grade on religious grounds);

Church of God v. Amarillo Independent School District, 511 F.Supp. 613 (N.D.Tex. 1981) (policy under which students received zeroes for absences for religious reasons in excess of two days held to violate the "free exercise" clause).

Where the exercise of religion involves actions as well as belief, freedom of religion will give way if the action involves "some substantial threat to public safety, peace, or order."

Sherbert v. Verner, 374 U.S. 402 (1963);
Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination).

See also the national employment descrimination law, Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000 *et seq.*), which forbids employment discrimination based on religion (§2000e-2) but allows an employer to demonstrate "that he is unable to reasonably accomodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Compare:

Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (7th Cir., 1979), *cert. denied*, 100 S.Ct. 689 (1980) (upholding dismissal of probationary teacher who refused on religious grounds to teach "any subjects having to do with love of country, the flag or other patriotic matters in the prescribed curriculum," such as "to teach. . .about President Lincoln and why we observe his birthday");

with *Moody v. Cronin*, *supra*.

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Cf.: Thomas v. Review Board of Indiana Employment Security Division, 101 S.Ct. 1425 (1981) (denial of unemployment compensation to man who left his job because his religious beliefs forbade participation in arms production violated right to free exercise of religion).

See also:

§I.B.8, "Freedom of Conscience -- Flag Ceremonies, Etc."

A somewhat different issue is raised when students seek to engage in religious exercises in school, on grounds of free exercise of religion or free speech. Such claims will usually be denied on the grounds that the exercises would be an unconstitutional "establishment of religion" (see above), unless the students are simply seeking to exercise the same rights of free speech that are available to other, non-religious student groups in the school without any school endorsement. Compare:

Brandon v. Board of Education, 487 F.Supp. 1219 (N.D.N.Y.), aff'd, 635 F.2d 971 (2nd Cir. 1980), cert. denied, 102 S.Ct. 970 (1981) (no right to hold prayer sessions in classrooms before start of classes);

Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43 (Ct.App. 1977), cert. denied, 434 U.S. 877 (1977) (Bible study club could not be given recognition);

with:

Widmar v. Vincent, 102 S.Ct. 269 (1981) (student religious group had free speech and association rights to meet in university facilities on same terms as other groups; Brandon distinguished because students there sought, on free exercise grounds, to use a forum not available to other student groups).

III. DISCRIMINATORY RULES OR PUNISHMENTS

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV, United States Constitution.

This section addresses discrimination in discipline on the basis of race, national origin, sex, handicap, or wealth. For discussion of discriminatory or unequal treatment which does not involve any of these categories, see §VI.C, "Equal Protection."

For sources of statistical data and other information relating to possible discrimination in your school system, see §XII, "Access to Information."

For addresses for filing complaints concerning discrimination with the Office for Civil Rights, see §XIII.C.

A. RACE AND NATIONAL ORIGIN DISCRIMINATION

Statistics collected by the Office for Civil Rights have documented that minority students are subjected to higher rates of suspension, expulsion and corporal punishment than white students on a nationwide basis. See Appendix. See also:

Children's Defense Fund, School Suspensions: Are They Helping Children? (1975);
Southern Regional Council and Robert F. Kennedy Memorial, The Student Pushout: Victim of Continued Resistence to Desegregation (1973);
Ted Glackman, et al., "Corporal Punishment, School Suspension, and the Civil Rights of Students: An Analysis of Office for Civil Rights Surveys," 23 Inequality in Education 61 (1978).

The task of challenging this practice through litigation is usually complex, both in terms of gathering, analyzing, and presenting the facts and in terms of the often unclear legal standards. The accompanying article describes recent efforts across the country, most notably the successful settlement in Ross v. Saltmarsh, 500 F.Supp. 935 (S.D.N.Y. 1980). Also discussed is Hawkins v. Coleman, 376 F.Supp. 1330 (N.D.Tex. 1974), the one case thus far in which the issue has been extensively litigated, and in which the court determined that the racial disparities were the result of discrimination.

For a more complete description of how the Hawkins case was developed, see Sylvia M. Demarest and John F. Jordan, "Hawkins v. Coleman: Discriminatory Suspensions and the Effect of Institutional Racism on School Discipline," 20 Inequality in Education 25 (July 1975).

Following the article is a discussion of relevant legal standards for challenging discriminatory discipline, and more recent cases.

LOCAL ADVOCACY

Successful Challenge to Discriminatory Discipline Practices in Upstate New York

Similar Cases Pending

A lawsuit challenging the widespread practice of suspending black and Hispanic students at a higher rate than white students has been settled successfully in Newburgh, New York. On May 14, 1980, just before the scheduled trial, defendants and the Federal District Court signed the consent decree drafted by plaintiffs in *Ross* v. *Saltmarsh*, who are represented by the Children's Defense Fund and Mid-Hudson Legal Services.

The decree requires that the school district eliminate all racial disparity in suspension rates by reducing the overall number of suspensions. Under a timetable which establishes interim goals, the difference between the minority suspension rate and the white rate at each of the two high schools and the junior high school in the district must be zero by June, 1981, although minor differences due to statistical random variation will be acceptable.

The methods for reaching this goal recognize the link between the problem of racially disparate discipline (the national suspension rate for blacks is more than twice the rate for whites) and a number of other factors, including vague discipline policies, over reliance on exclusion, inadequate student participation in decision-making, inadequate parent and community involvement, the staff's racial composition, absence of meaningful in-service training and support for teachers, academic programs which do not meet the needs of minority students, and academic tracking which increases within-classroom segregation.

Steps Proposed to Eliminate Disparities

Proposals for steps to eliminate the disparities will be drafted by a consultant, hired and selected by the school district from a list of three nominees proposed by plaintiffs. Among the items to be covered by these proposals are:

- modification of the district's discipline code, including clarification and reduced use of methods which remove students from the classroom;
- design of in-school alternatives to suspension;
- greater involvement by students, parents, student advocates, and guidance counselors in the discipline process;
- assistance to teachers with high discipline referral rates;
- tutoring for students with achievement-related behavior problems;
- referral of students for psychological services;
- more interracial participation in extra-curricular activities;
- exploration of new ways to group students academically so that their classrooms have a good balance of minority and white students.

The consultant's proposals for each school are developed with, and submitted to, that school's "building committee" which is composed of one teacher (selected by the district), four students (three selected by plaintiffs, one by the district), four parents (three selected by plaintiffs, one by the district), one community representative (selected by plaintiffs), and the building principal. The committee is responsible for ongoing solicitation of the opinions of as many students and parents as possible.

Following submission to the building committee and modification based upon its advice, the proposal is submitted to the Superintendent. If s/he does not accept it in full, it may be presented to the board of education by either the consultant or the building committee. Regardless of whether specific proposals are accepted or rejected, the district is responsible for eliminating the disparity, and failure to meet the timetable can result in additional court-ordered relief.

The consultant also arranges for the school district to contract for training. All teachers and administrators will be trained in race relations and in discipline. Students and parents on the building committees will receive training for effective participation.

The district must also take whatever steps are necessary to hire more minority teachers. When the suit was filed, more than 30% of the students were black and Hispanic but only 6% of the teachers were from minority groups.

The district must supply the consultant and the building committees with a variety of information related to their functions. Both the district and the consultant must compile progress reports.

Along with the consent decree, Judge Mary Johnson Lowe issued an opinion in which she stated that "this Court considers the proposed settlement fair and reasonable."

The suit was filed in 1974 on behalf of all minority students in the district, following suspension of black students stemming from protests and demonstrations against racial discrimination. In 1977, a preliminary injunction was issued based upon violation of the notice and hearing requirements established by state law.

For more information on this case contact the Children's Defense Fund, 1520 New Hampshire Ave., N.W. Washington, D.C. 20036, (202-483-1470).

Dallas Decision

Ross is the first major court action addressing racial disparities in discipline since the court in *Hawkins* v. *Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974), held that the racial disparities in Dallas were the product of illegal discrimination. In that case, the court rejected defendants' claims that the disparities simply reflected greater misbehavior by black students for which the district was not responsible. Instead, the court found that the disparity was caused at least in part by (1) selective staff perceptions whereby black students were referred and punished more frequently and more harshly for equivalent conduct, (2) punishment for cultural differences which should not have been viewed as disruptive, such as wearing hats or different styles of verbal and physical interaction, and (3) provocation of black students resulting from insensitivity, lack of access to institutional decision-

Continued on next page . . .

LOCAL ADVOCACY Discrimination in Discipline

(continued from page 3)

making, "personal racism," "institutional racism" and a "white-controlled institution." Defendants were ordered to produce a plan to eliminate the disparities, but plaintiffs have thus far met with less success in obtaining a plan that works.

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Other Cases

Several other cases alleging racial discrimination in discipline are pending:

Long v. Thornton Township High School District 205, Cook County Legal Assistance Foundation, 15325 South Page St., Harvey, IL 60426, (312-339-5550). Class was certified and defendants were granted summary judgment on the procedural due process claim, April 18, 1979.

Y. v. Shelton, Bay Area Legal Services, 305 N. Morgan St., Tampa, FL 33602, (813-223-2525). Class has been certified.

Evans v. *Burger*, Camden Regional Legal Services, Inc. 96 North Pearl St., Bridgeton, NJ 08302, (609-451-0003). Temporary restraining order reinstating named plaintiffs granted.

Stevenson v. *Jefferson County Public School Board*, Legal Aid Society of Louisville, 425 W Muhammed Ali Blvd., Louisville, KY 40202, (502-584-1254). Challenges disproportionate discipline across the entire 165-school Jefferson County district.

Community Group for a Better Education v. Los Angeles Unified School District, Legal Aid Foundation of Los Angeles, 1550 West Eighth St., Los Angeles, CA 90017. Challenges disproportionate discipline throughout entire Los Angeles school system.

Prince v. County School Board of Greensville County, Virginia, Virginia Legal Aid Society, Inc., 412 South Main St., Emporia, VA 23847, (804-634-5172). Case voluntarily dismissed when defendants agreed to reinstate all plaintiffs, expunge records of exclusion, and change disciplinary rules and procedures. Counsel reports that suspensions have declined dramatically since the rule changes. PW

Illustration by Bernice Robinson

Legal Standards

Equal Protection

Under the Equal Protection Clause, actions by the state, including school officials, which create racial classifications are subject to strict scrutiny and are illegal unless the state can demonstrate a compelling interest in the classification which cannot be served through any lesser means. (Where strict scrutiny does not apply, equal protection requires only a rational relationship between the state's action and some legitimate state interest. See §VI.C, "Equal Protection.")

Intent Requirement -- Showing Present Intent

Actions which have differential effects by race (such as higher suspension rates for minority students) will not be treated as "racial classifications" unless there is proof of discriminatory "intent." *Washington v. Davis*, 425 U.S. 229 (1976). A variety of factors may be used as evidence of intent -- including disparate impact, the foreseeability of that impact, the historical background of the decision, the specific sequence of events, procedural or substantive departures from normal practices, and statements made by the state officials. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977). Nevertheless, foreseeable disproportionate impact is generally not enough by itself to create a presumption of discriminatory intent; in most circumstances it must still be shown that the action was taken because of, and not merely in spite of, its foreseeable impact. *Personnel Administrator of Massachusetts v. Feeney*, 99 S.Ct. 2282 (1979). On the other hand, it is enough to show that discriminatory purpose was one motivating factor; it need not be the "dominant" or "primary" purpose in order to establish discrimination. *Arlington Heights*, *supra*, 429 U.S. at 265.

Further, in certain circumstances, very stark impact alone may be sufficient proof of intent: "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id*. at 266. Accord:

Casteneda v. Partida, 430 U.S. 482 (1977);
Yick Wo v. Hopkins, 118 U.S. 356 (1886).

(This doctrine might be useful, for instance, where, among students who have been referred for school board hearings for allegedly serious misconduct, minority students are consistently expelled and white students are consistently treated mildly. This is much more pointed than a general unanalyzed overall disparity in suspensions.)

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Despite the intent requirement, there are certain presumptions which can, in some school systems, reduce or eliminate the burden of demonstrating intent. These presumptions, largely developed by the Supreme Court in desegregation cases, provide different means of connecting current racial disparities with prior, or other, findings of discriminatory intent. Advocates, however, should where possible avoid relying solely on these presumptions, since they may not always be expansively applied by lower courts. Instead, as much concrete evidence as possible should be presented to show that in fact there are real connections between those other intentional actions and the practices which produced the racial disparities in discipline. (See discussion of Hawkins, Tasby, and "Other Cases" below.)

The focus of the discussion below is on two aspects of the desegregation cases which may be useful in analyzing racial disparities in discipline. One is the extent to which, following initial findings of intentional discrimination, the continued biased attitudes and practices may similarly produce intentionally discriminatory treatment of students in the discipline process itself. The other focus is on the extent to which, following initial findings of intentional discrimination, the failure to fully remedy the vestiges and effects of this discrimination may perpetuate an academic and interpersonal atmosphere which does not provide minority students with full equal educational opportunity, which may result in increased student frustration and discipline problems.

Inferring Present Intent from Past Intent

First, where it has been, or can be proved that the system intentionally discriminated in the past, (for instance, by intentionally segregating students by races), there is a presumption that actions which produce racial disproportion in the present are motivated by a similar intent to discriminate, and the burden is on school officials to prove otherwise.

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 208-10, (1973):
U.S. v. Texas Education Agency, 564 F.2d 162. 165 (5th Cir. 1977), cert. denied, 99 S.Ct. 3106 (1979).

Inferring Intent in Discipline from Intent Elsewhere in the System

Second, where it has been, or can be, similarly shown that school authorities are intentionally discriminating in the present in one "meaningful" or "significant" portion of the system, there is a presumption that disproportionate effects in other parts of the system are likewise motivated by discriminatory intent. Keyes, supra, 413 U.S. at 208-10; Columbus Board of Education v. Penick, 99 S.Ct. 2941, 2945-46 (1979). Thus, if the school district is or has been under a desegregation order and has been held to have engaged in intentional segregation or some other form of intentional discrimination, students should be able to rely on a presumption that racial disparities in discipline are racially motivated, putting the burden on school officials to prove otherwise.

Perpetuating the Effects of Past Intent/Duty to Remove All Vestiges

Third, if there has been intentional discrimination in the past, there is a presumption that racially disparate effects in the present are the result of that past intentional discrimination.

Dayton Board of Education v. Brinkman, 99 S.Ct. 2971 (1979);
Keyes, *supra*, 413 U.S. at 211.

(This is different from the first presumption, above. There, past intent is used to infer *present intent*. Here, *past intent* is presumed to have produced the *present effects*; regardless of whether school officials no longer intend to discriminate, their past intentional acts presumably are still producing discriminatory effects.)

School officials cannot use methods of administration which, while neutral on their face, carry forward the effects of their own prior intentional discrimination.

Gaston County, N.C. v. U.S., 395 U.S. 285 (1969) (literacy test requirements for voting unconstitutional because carried forward effects of past discrimination in education);
U.S. v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978) (ability grouping unconstitutionally carried forward effects of prior intentional segregation);
Debra P. v. Turlington, 474 F.Supp. 244 (M.D.Fla. 1979), *aff'd in relevant part*, 644 F.2d 397 (5th Cir. 1981) (state "functional literacy examination" requirement for graduation unconstitutionally perpetuated effects of prior unconstitutional denial of equal education opportunities).

Similarly, prior intentional discrimination may have produced a number of effects which are responsible in part for present disparities in school discipline (e.g., the link between "discipline problems" and low academic performance, produced in turn by past intentional denial or equal educational opportunities).

Moreover, school systems, rather than perpetuating the effects of their prior discrimination, have an affirmative obligation to eliminate all the remaining vestiges of that prior discrimination so that it has no present effects.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971);
Milliken v. Bradley, 433 U.S. 267 (1977);
Columbus Board of Education v. Penick, *supra*, 99 S.Ct. at 2948;
Dayton Board of Education v. Brinkman, *supra*, 99 S.Ct. at 2979.

As these decisions note, this obligation requires school officials to address and remedy a variety of lingering effects which tend to result from prior intentional discrimination, such as teacher attitudes and expectations, faculty segregation, racial stereotyping and hostility among students and staff, differences in achievement levels resulting from inferior curriculum and resources previously provided to black students, etc. -- all of which contribute to the school atmosphere and environment which shape disciplinary practices.

In fact, various desegregation orders have required school systems to address a broad range of problems stemming from their prior intentional segregation, including discipline directly and a number of factors clearly related to discipline. For instance, in Bradley v. Milliken, 402 F.Supp. 1096 (E.D.Mich. 1975), aff'd, 433 U.S. 267 (1977), the court issued and discussed orders covering programs necessary to address these effects in a wide variety of areas -- including a new discipline code, a statement of student rights and responsibilities, in-service staff training, guidance and counseling programs, parent and community involvement, remedial reading programs, development of communication skills, faculty assignments, bilingual and multi-ethnic studies, extracurricular activities, etc. The discussion of in-service training is particularly instructive (402 F.Supp. at 1139):

> A comprehensive in-service training program is essential to a system undergoing desegregation. A conversion to a unitary system cannot be successful absent an in-service training program for all teachers and staff. All participants in the desegregation process must be prepared to deal with new experiences that inevitably rise. The order that follows pursuant to these guidelines requires in-service training in such fields as teacher expectations, human relations, minority culture, testing, the student code of conduct [previously ordered by the court] and the administration of discipline in a desegregated system for all school personnel. The program shall also include an explanation of the purpose and nature of each component in the desegregation order. It is known that teachers' attitudes toward students are affected by desegregation. These attitudes play a critical part in the atmosphere of a school and affect the pulse of the school system. Teachers, both white and black, often have unhealthy expectations of the ability and worth of students of the opposite race. Moreover, it is known that teachers' expectations vary with socio-economic variations among students. These expectations must, through training, be re-oriented to ensure that academic achievement of black students in the desegregation process is not impeded.

The court also noted that minority students subjected to discrimination "often lose interest in education, eventually believing they have no stake in the system" and that this "inevitable result is reflected . . . in the system's drop-out rate" [and, arguably, the "push-out" rate, as affected by formal and informal disciplinary exclusions]. 402 F.Supp. at 1140. The Supreme Court specifically affirmed the various components ordered by the district court as necessary to remedy and undo the effects of the prior discrimination, declaring that physical desegregation alone is not enough.

433 U.S. at 280, 281-88. Moreover, the Court specifically noted that children "educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes" which differ from that larger community. 433 U.S. at 287. It compounds, rather than remedies, past discrimination for school officials to punish students for these differences of "speech, conduct, and attitudes." [In an earlier, unreported decision, *Bradley v. Milliken*, C.A. No. 35257 (E.D.Mich. 7/3/75), the court, noting "a strong tendency to apply disciplinary measures in a discriminatory fashion" in desegregating systems, rejected the district's proposed discipline code because of the need for: more uniformity; uniform and accurate reporting of all incidents and findings; listing and distinguishing major offenses and minor offenses ("Major offenses should consist of those infractions which involve criminal activity posing a threat to life, physical safety or property"); spelling out the range of corrective actions for each offense; avoidance of vague descriptions of offenses; setting forth students' various rights of due process, free expression, and freedom from unreasonable search and seizure; eliminating "temporary exclusions" without due process; and ending the heavy reliance on disciplinary transfers.]

In *Berry v. School District of City of Benton Harbor*, 515 F.Supp. 344 (W.D.Mich. 1981), (on appeal), court provided extensive discussion of the components of its similar desegregation remedy (including programs for academic and social development, non-biased, multiracial curriculum, materials, and extracurricular activities; teaching methods which encourage cooperation and interdependency among students; staff desegregation and affirmative action; detailed in-service training programs, to address staff attitudes, perceptions, behavior, and skills; guidance and counseling; parent and community involvement; monitoring; and reporting). In the area of discipline, the court stated (379):

> Students' perception of and feeling of fairness in the schools is absolutely critical to the success of this or any desegregation plan. Without clearly established standards of both expected behavior and unacceptable conduct an environment where students are treated fairly cannot develop. Some educators believe strongly that achievement is significantly related to perception of school fairness. Conseequently, the task of developing a clear and fair code of conduct and discipline is of special importance to the desegregation process and should be carried out early on in that process.
>
> A good uniform code of conduct alone does not create an atmosphere of fairness within these schools. Enforcement by teachers and administrators on a day-to-day basis is equally important in creating a feeling of fairness in the students of these three districts. In desegregated schools it is not unusual that rules may be administered, inadvertently or deliberately, in a way that minority students may be caught and/or punished more frequently and in different degrees than white students. Special attention should be paid by staff members in each of the three districts to their personal attitudes that may contribute to this potential problem, especially for interdistrict transfer students.

The court mandated a biracial committee of school officials and staff, students, parents, and community members to draft a code proposal for school board approval. The court provided some directions as to the code's content, including the following (380):

> The committee should focus on establishing a basically fair code of conduct and behavior as well as sound, equitable and effective consequences for violations of the code of conduct. Conduct warranting suspension or expulsion should be clearly defined. *Use of suspension or expulsion should be limited to a last resort* and the committee should explore the use of effective alternatives to suspension or expulsion. Discipline procedures should include an opportunity for a prompt appeal by a student or parent to a bi-racial panel of administrative orders to remove or suspend a student. To the extent possible, the committee should explore and incorporate in its report recommendations to eliminate or minimize the opportunity for interjection of personal bias or negative racial attitudes in enforcement of discipline. Finally, the committee should avoid the use of excessive numbers of rules. An atmosphere that relies too heavily on rigid control of student behavior may become counterproductive. [emphasis added]

The court ordered a plan for distributing and communicating the codes to staff, students and parents, including the use of workshops (381). Finally, the court-ordered desegregation reports were to include discipline information (385).

For similar desegregation rulings on the steps which must be adopted to remedy the lingering effects of prior discrimination, see:

Evans v. Buchanan, 582 F.2d 750, 767-74 (3rd Cir. 1978) (en banc), *cert. denied*, 100 S.Ct. 1862 (1980) (in-service training, reading and communication skills, curriculum, counseling and guidance, human relations, and code of student rights and responsibilities);

Reed v. Rhodes, 455 F.Supp. 569 (N.D.Ohio 1978) (similar components, and, citing evidence of disproportionate suspension rates, finding that district's proposals on student rights and discipline "are totally inadequate to assure that the implementation of desegregation in Cleveland will not be accompanied by discriminatory application of student discipline policies" because the proposals were "vague and ambiguous," "place a disproportionate stress on discipline without providing adequate safeguards to protect the rights of students," "ignores the need for sensitive understanding on the part of administrators, faculty, or students," and because "implementation of the student code is left to the discretion of individual building principals"(601-02); court also ordered detailed reporting of discipline; also, emphasis or importance of non-discriminatory provision of extracurricular activities);

U.S. v. Board of School Commissioners, 506 F.Supp. 657, 671-75 (S.D. Ind. 1979), *aff'd*, 637 F.2d 1101 (7th Cir. 1980) (in-service

training, addressing erroneous teacher racial expectations of students' abilities, tests and curriculum, written codes, community and parent involvement, and monitoring);
U.S. v. Wilcox County Board of Education, C.A. No. 3934-65-H (S.D. Ala. 5/14/73)(remedy included uniform discipline code);

Equal protection cases cited in the discussion of bilingual education issues below.

In sum, the desegregation cases above establish different but related points. First, the broad range of academic and other remedial relief rests on the principle that a district which has practiced intentional racial discrimination is responsible for all the continuing effects of that discrimination, which often include an academic and interpersonal atmosphere which is not conducive to the educational needs of minority students, which can in turn be reflected in increased disciplinary problems. Thus, present racial disparities in discipline can be linked to prior intentional discrimination through the medium of an inadequate educational environment and denial of equal educational opportunity. Second, the specific desegregation relief on discipline is based in part on recognition of a more direct link between the prior intentional discrimination and the persistence of discriminatory application of the discipline rules and procedures themselves, through the medium of continued biased perceptions, attitudes and by staff toward minority students and minority student conduct. Third, in both cases, advocates should be helped by the rebuttable legal presumptions concerning these linkages -- i.e., in the first case, a presumption that continued disparities are the product of failure to remedy fully all the effects of the prior intentional acts, and in the second case, a presumption that continued disparities, like the earlier actions, are themselves racially motivated.

For related discussion, see:

§VII.E.3, "Punishment for Conditions Caused by the School -- Effects of Racial Discrimination, Inappropriate Education, Unmet Special Needs, Etc.;"
§XIII.A, "Remedies."

In presenting disciplinary statistics to meet these equal protection standards, certain kinds of evidence, if available, can sometimes make the overall disparities more revealing. First, for example, a showing that the racial disparities are greater for discretionary offenses which involve a good deal of discretionary judgment by staff (e.g., "disruption," "insubordination," "insolence," "refusal to identify oneself upon request") than for less discretionary offenses (e.g., smoking, drugs) would seem to point to discriminatory treatment in the administration of discipline itself. Second, a showing that certain teachers refer students at a much more disparate rate than others may be helpful. Third, a showing that schools with essentially similar student bodies (in terms of race, income, etc.) nevertheless have markedly different rates of suspension points to the schools' role in the phenomenon.

For a useful reference, see David C. Baldus and James W.L. Cole, Statistical Proof of Discrimination (1980).

Title VI of the 1964 Civil Rights Act

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. Sec. 2000d (Title VI of the 1964
Civil Rights Act).

The Federal regulations accompanying Title VI recognize that racial and national origin discrimination can come in many forms. 34 C.F.R. Sec. 100.3(b) provides:

> (1) A recipient [of Federal funds] may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:
>
> (i) deny an individual any service, financial aid, or other benefit provided under the program;
> (ii) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
> (iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
> (iv) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
> (v) treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
> (vi) deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded to others under the program. . .;
> (vii) deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.
>
> (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided

> under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, or national origin.
>
> (3) In determining the site or location of a facility, an applicant or recipient may not make selections with the effect of excluding individuals from, denying the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act of this regulation.

In Lau v. Nichols, 414 U.S. 563 (1974) (failure to address the language needs of Chinese students), the Supreme Court relied upon and upheld that portion of the Title VI regulations above which forbids "criteria or methods of administration which have [a discriminatory] effect." Some lower courts have assumed that, under the Supreme Court decision in Regents of University of California v. Bakke, 438 U.S. 265 (1978) (addressing affirmative action programs), Title VI now requires the same intent standard as the Equal Protection Clause.

> Guardians Association v. Civil Service Commission, 633 F.2d 232, 254, 270, 272-75 (2nd Cir. 1980), cert. granted, 102 S.Ct. 997 (1982);
> Lora v. Board of Education, 623 F.2d 248 (2nd Cir. 1980);
> Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981);
> Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981), cert. denied, 102 S.Ct. 981 (1981);
> Harris v. White, 479 F.Supp. 996 (D.Mass. 1979).

Other courts, however, have recognized that the Court in Bakke continued to rely on Lau, and that one question alone was presented in Bakke: when is it permissible to use a racial classification? (Bakke claimed that, under Title VI, all racial classifications are illegal, no matter how compelling the state's justification for the classification. The Court rejected this argument.) The issue of "intent" versus "effects," on the other hand, goes to the question of how to determine whether a racial classification exists in the first place. That issue was simply not before the Court in Bakke, where there was no question that the university had set up an explicit racial classification which explicitly treated applicants differently because of race. See, e.g.:

NAACP v. Medical Center, 657 F.2d 1322 (3rd Cir. 1981);
Jackson v. Conway, 476 F.Supp. 896, 903 (E.D.Mo. 1979) aff'd on other grounds, 620 F.2d 680 (8th Cir. 1980);
Larry P. v. Riles, 495 F. Supp. 926, 964-74 (N.D.Cal. 1979) (on appeal) (applying Title VI effects standard in striking down California's use of I.Q. test which resulted in disproportionate placement of black students in classes for mentally retarded).

Cf.: Bryan v. Koch, 627 F.2d 612, 616 (2nd Cir. 1980);
De la Cruz v. Tarmey, 582 F.2d 45 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979) (Title IX);
New Mexico Association for Retarded Children v. New Mexico, 495 F.Supp. 391, 348 (D.N.H. 1980) (§504 of the Rehabilitation Act).

See also the lower court opinion in Guardians Association, supra, 466 F.Supp. 1273, 1286 (S.D.N.Y. 1979), which provides one of the clearest analyses and whose logic was not really addressed in the court of appeals' reversal. (A Supreme Court decision on the case is expected during the 1982-83 term.)

Assuming that the regulations approved in Lau are still in effect, racial disproportion in the discipline would be subject to standards similar to that used for racial disparities in employment discrimination under Title VII of the 1964 Civil Rights Act (20 U.S.C. §2000e) -- once significant disparate effects are shown, the school district would have the burden of demonstrating sufficient educational justification for the disparate practices, a burden which cannot be met if reasonable alternatives for serving the system's needs are available and would have less disparate impact. (See Larry P., 495 F.Supp. at 966.) Under this standard, the school could probably not justify, for example, suspension for relatively minor offenses. [NOTE: The argument concerning Title VI standards must be carefully thought through. The Center for Law and Education has a brief on the issue, which also discusses the equal protection standards above, in the context of "comptency testing."]

Equal Educational Opportunities Act of 1974

The Equal Educational Opportunities Act of 1974 (20 U.S.C. §1703) provides:

> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of

> segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;
>
> (d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff. except to fulfill the purposes of subsection (f) below;
>
> (e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Note the similarity between the standard in §1703(b) and the equal protection standard discussed above under "Perpetuating the Effects of Past Intent."

A recent case addressing "language barriers" under §1703(f) may be of some use in discriminatory discipline cases. In Martin Luther King Elementary School Children v. Ann Arbor School District, 473 F.Supp. 1371 (E.D. Mich. 1979), the court found that "black English" is a version of English distinct from "standard English" and held that, despite the absence of intent to discriminate, the school district had violated the act by failing to provide appropriate support and training to teachers in learning about black English and using that knowledge in designing methods for teaching standard English. The recognition of differences in language, and the barriers which can be created, is relevant to racial disparities in discipline to the extent that language and language differences are often at the center of disciplinary incidents involving minority students (e.g., "insolence," "disrespect," "insubordination"). (See below for discussion of the Act's application to bilingual education.)

Hawkins v. Coleman

The opinion in Hawkins v. Coleman, 376 F.Supp. 1330 (N.D.Tex. 1974) was issued before many of the current standards for establishing racial discrimination were fully developed, and the opinion contains no extended discussion of legal standards. Yet, the case maintains its vitality in that its findings and holdings would appear to be consistent with the present equal protection standards as described above. The findings that the racial disparity was caused in part by (1) selective staff perception, in which black students are more frequently "noticed" and singled out than white students for essentially similar conduct; (2) black students being punished for conduct which reflects cultural differences and which need not and should not be viewed as substantially disruptive; and (3) black student behavior provoked in part by various forms of past and present discrimination and failure to address their needs ("personal racism," "institutional racism," "white-controlled institution"); all can be viewed both in terms of present intent and perpetuation of the effects of past intent. The Title VI and EEOA theories above would provide additional handles for analyzing the facts established in Hawkins.

In Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981), parents in this same Dallas system, concerned about the persistence of racially disparate discipline, unsuccessfully attempted to obtain further relief, not under Hawkins, but through the ongoing desegregation suit. The court held that plaintiffs' aggregate statistical evidence alone was insufficient in the absence of any evidence of arbitrary practice, undeserved or unreasonable punishment of black students, or failure to discipline whites for similar misconduct. The court failed, however, to explain why the principles in Keyes and other cases above do not create a presumption that the disparities are the product of the continued failure to remedy fully the effects of prior systemwide intentional discrimination established earlier in Tasby, shifting the burden of proof to defendants. Nor is there any discussion of Hawkins and whether there was direct failure to implement the relief ordered there, and no explanation as to why there is not a presumption that the same discriminatory factors and motives which were found to produce the disparities at that time are also responsible for the current disparities. This seems to be a case of judicial amnesia. The result does point to the advisability of introducing whatever concrete evidence is available to flesh out the story which the statistics seem to tell.

Other Cases

In addition to the cases discussed above and in the accompanying article, see:

City of Mobile, Alabama v. Bolden, 100 S.Ct. 1490 (1980) (more on "intent" requirement; note absence of a majority opinion);

Rogers v. Lodge, ___S.Ct._____, 50 U.S.L.W. 5041 (7/1/82) (somewhat more expansive recent decision on "intent");

Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (racially discriminatory pattern of enforcement of prison rules);

Sims v. Waln, 536 F.2d 686, 690 (6th Cir. 1976), cert. denied, 97 S.Ct. 1693 (1977) (no showing that racial disparity in disipline was the result of greater severity or based upon bias);

Boykins v. Ambridge Area School District, 621 F.2d 75 (3rd Cir. 1980) (reversing dismissal of claim by black student that her expulsion from drill team was the result of coach's discriminatory conduct);

Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (expulsion of white student from private school for alleged romantic involvement with black student and for her father's complaining to NAACP violated 42 U.S.C. §1981);

Davis v. Board of Education, 635 F.2d 730, 733 (8th Cir. 1980) (appeals court noted that lower court had not explicitly decided whether racial disparity in suspension was the result of discrimination and expressed its belief that implementation of its mandates concerning a nonracially identifiable staff would dramatically improve the situation);

Bradley v. Milliken, 476 F.Supp. 257, 258 (E.D.Mich. 1979)(expressing concern that court-ordered student conduct code was not being applied uniformly);

Sellman v. Baruch College, 482 F.Supp. 475 (S.D.N.Y. 1979) (student introduced no evidence to show that minimum credit and grade-point-average requirements for student government positions had a disproportionate impact on minority students or were intended to discriminate);

United States v. Richardson Independent School District, 483 F.Supp. 80 (S.D.Tex. 1979) (school rule not enforced against white teachers used as pretext for dismissing black teacher);

Quarles v. Oxford Municipal Separate School District, C.A. No. WC-69-62-K (N.D.Miss. 3/16/81) (Clearinghouse No. 2867D) (rule mandating expulsion for possession of knife applied in a racially discriminatory manner, not enforced against principal's son).

Issues Specific to Bilingual Students

The EQUAL PROTECTION principles discussed above concerning racial discrimination are equally applicable to discrimination on the basis of national origin -- for instance, against Hispanic students. See, e.g.:

Keyes v. School District No. 1, supra, 413 U.S. at 197;

Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975), cert. denied, 423 U.S. 1034 (1976).

Under these principles, as discussed above, historic intentional discrimination, including segregation, against national origin groups can be linked to current disparities in discipline -- through either (1) a rebuttable presumption that current disproportionate practices are motivated by discriminatory intent if significant prior or other current practices were so motivated, or (2) a rebuttable presumption that current disparities are in part the result of the lingering, unremedied effects of the earlier intentional discrimination, regardless of current motive. In the first instance, the focus is on the existence of discrimination within the administration of discipline itself. In the second, the focus is on the effect which failure to provide full equal educational opportunity may have on student behavior. In either case, just as with race, once the disparities are found to be at least partly the product of intentional national origin discrimination they will be found to violate equal protection unless, under strict scrutiny, the school can demonstrate that its actions are necessary for some compelling state interest which cannot be achieved through other means. (See equal protection discussion above.)

These principles can take on additional meaning when the student's primary language is not English. Thus, compare the discussion of Milliken v. Bradley, supra, and other cases above, with Serna v. Portales Municipal Schools, 499 F.2d 1147, 1150 (10th Cir. 1974):

> Expert witnesses explained what effect the Portales school system had on Spanish surnamed students. Dr. Zintz testified that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowered self esteem develop. Henry Pascual, Director of the Communicative Arts Division of the New Mexico Department of Education, stated that a child who goes to a school where he finds no evidence of his language and culture and ethnic group represented becomes withdrawn and nonparticipating. The child often lacks a positive mental attitude. Maria Gutierrez Spencer, a longtime teacher in New Mexico, testified that until a child developed a good self image not even teaching English as a second language would be successful. If a child can be made to feel worthwhile in school then he will learn even with a poor English program. Dr. Estevan Moreno, a psychologist, further elaborated on the psychological effects of thrusting Spanish surnamed students into an alien school environment. Dr. Moreno explained that children who are not achieving often demonstrate both academic and emotional disorders. They are frustrated and they express their frustration in lack of attendance, lack of school involvement and lack of community involvement. Their frustrations are reflected in hostile behavior, discipline problems and eventually dropping out of school.

See Cintron v. Brentwood Union Free School District, 455 F.Supp. 57, 62 (E.D.N.Y. 1978), quoting this language with approval.

Based on this reasoning, potential relief for systemwide discrimination on the basis of national origin (such as segregation of Mexican-American students) includes the same kinds of programs discussed above concerning desegregation remedies in general, as well as specific bilingual/bicultural programs to address language differences. (See cases below.) Disparities in discipline rates may be linked to the failure to provide adequate relief for this prior discrimination.

The discussion of TITLE VI above is also fully applicable to national origin discrimination. In addition, the Supreme Court has held that Title VI imposes a duty to address the language needs of students who are not proficient in English so that they have "a meaningful opportunity to participate in the educational program." Lau v. Nichols, 414 U.S. 563, 568 (1974). Unlike the equal protection claim, the Court found that this duty exists under Title VI independent of any connection to remedying the effects of intentional discrimination. (But see above on current controversy concerning effects vs. intent.) The court upheld the Department of Education's Title VI interpretation, which declares [35 Fed. Reg. 11595 (May 25, 1970)]:

(1) Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.

(4) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

Further guidance as to the Title VI requirements is provided by the Department in the so-called "Lau Remedies" of August 1975 (Memorandum to Chief State School Officers, "Evaluation of Voluntary Compliance Plans Designed to Eliminate Educational Practices which Deny Non-English Language Dominant Students Equal Educational Opportunity"). (In June, 1982, the Department informally indicated that it was no longer relying on the Lau Remedies and was instead relying on the 1970 memorandum alone.)

The EQUAL EDUCATIONAL OPPORTUNITIES ACT of 1974, 20 U.S.C. §1703(f), cited at greater length above, prohibits denial of equal educational opportunity on account of race, color, sex or national origin by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs". There is no requirement to show discriminatory intent in order to invoke this provision of the Act.

Castaneda v. Pickard, 648 F.2d 989, 1008 (5th Cir. 1981);
Martin Luther King Elementary School Children v. Ann Arbor School District, supra;
U.S. v. Texas, 506 F.Supp. 405, 431-34 (E.D.Tex. 1981) (on appeal).

The BILINGUAL EDUCATION ACT, 20 U.S.C. §3221 et seq. (Title VII of the Elementary and Secondary Education Act) which applies only to school systems which receive funds under the Act, imposes various requirements for bilingual education programs. Perhaps most important is the Act's definition [§3223(a)(4)(A)]:

> The term "program of bilingual education" means a program of instruction, designed for children of limited English-speaking ability in elementary or secondary schools, in which, with respect to the years of study to which such program is applicable --
>
> (i) there is instruction given in, and study of, English and to the extent necessary to allow a child to progress effectively through the educational system, the native language of the children of limited English-speaking ability, and such instruction is given with appreciation for the cultural heritage of such children, and, with respect to elementary school instruction, such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system; ...
>
> [Other parts of the definition deal with enrollment of English-speaking students, participation in certain regular classes, age and grade level grouping, and parent participation.]

Finally, many STATES now have their own BILINGUAL EDUCATION LAWS which impose affirmative requirements on local districts. See, for example, Illinois Ann. Statutes, Ch. 122, §§2-3.39, 10-22.38(a), 14B-6,7,8, 14C, 34-18.2; Massachusetts General Laws, Ch. 71A.

Among the significant court decisions dealing with bilingual education under one or more of the above laws are:

Lau v. Nichols, supra;
Keyes v. School District No. 1, Denver, supra, 413 U.S. at 197; 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976);
Serna v. Portales Municipal Schools, supra;
Morales v. Shannon, supra;
Castaneda v. Pickard, supra;
Idaho Migrant Council v. Board of Education, 647 F.2d 69 (9th Cir. 1981);
United States v. Texas, 342 F.Supp. 24 (E.D.Tex.), aff'd per curiam, 466 F.2d 518 (5th Cir. 1972); 506 F.Supp. 405 (1981) (on appeal);
Morgan v. Kerrigan, 401 F.Supp. 216, 242 (D.Mass. 1975), aff'd, 530 F.2d 401 (1st Cir. 1976), cert. denied, 96 S.Ct. 2648 (1976);
Bradley v. Milliken, supra, 402 F.Supp. at 1144; 620 F.2d 1143 (6th Cir. 1980), cert. denied, 101 S.Ct. 207 (1980);
Aspira v. Board of Education of the City of New York, 58 F.R.D. 62 (S.D.N.Y. 1973), 394 F.Supp. 1161 (S.D.N.Y. 1975);
Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978).

Compare:
Guadalupe Organization, Inc. v. Elementary School District No. 3, 587 F.2d 1022 (9th Cir. 1978);
Otero v. Mesa County Valley School District No. 51, 408 F.Supp. 162 (D.Col. 1975), rev'd in part on other grounds, 568 F.2d 1312 (10th Cir. 1977).

While there is some controversy about the best methods for providing bilingual education, current law, under most, but not all, of the statutes, administrative interpretations, and court decisions above, requires generally that it be provided in a manner which (a) uses the native language at least to the extent necessary to prevent the student from falling irretrievably behind in subject areas while being taught English and (b) does not fail to respect the student's native language, history, and culture. See, for example, the Bilingual Education Act, supra. (For more information on specific mandates, contact the Center.)

When a school system fails to fulfill this obligation to provide equal educational opportunity to students with limited English proficiency, the resulting EXCLUSION FROM MEANINGFUL PARTICIPATION may produce additional discipline problems, as noted in Serna, supra. Moreover, once the failure to implement these requirements has been proven, the burden should be on the school to demonstrate that the disproportionate rate of discipline for these students is not the product in part of this failure, under the legal presumptions discussed earlier.

Beyond these problems, there may be DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN DIRECTLY IN THE DISCIPLINE PROCESS ITSELF, such as through culturally biased perceptions and judgments about student conduct. Here again, all the principles above concerning racial discrimination are fully applicable, including the rebuttable presumption, once widespread intentional discrimination in the past or in other areas of school practices has been proven, that disparities in discipline are also discriminatorily motivated. Further, there are particular forms of discipline which are tied to the student's language, such as when STUDENTS are PUNISHED for SPEAKING to each other IN THEIR NATIVE LANGUAGE. See:
United States v. Texas, supra, 506 F.Supp. at 412, 414-15.
Cf.: Equal Employment Opportunity Commission, Guidelines on Discrimination Because of National Origin, 29 C.F.R. §1606.7 (rule requiring employees to speak only English at certain times is not permissible unless employer demonstrates that it is justified by business necessity, and rules requiring English at all times will be especially closely scrutinized).
But see:
United States v. Gregory-Portland Independent School District, 654 F.2d 989, 999-1002 (5th Cir. 1981), rev'g United States v. Texas, 498 F.Supp. 1356, 1361-62, 1373 (E.D.Tex. 1980) (court of appeals questions lower court findings that rule was discriminatory, but note that the issue here was not whether the rule itself was discriminatory, but whether it provided a basis for proof of intentional segregation of students).

Punishing students for talking to each other in their own language is also arguably a violation of the FIRST AMENDMENT, in the absence of proof that the punishment is necessary to serve a compelling educational need which cannot be acheived through less drastic means. See §I generally, and §I.B.1, "Speech," in particular.

Discipline issues specifically affecting bilingual students and parents are also addressed in OTHER SECTIONS:

§V.A.1, "Language of Rules;"
§VII.E.3, "Punishment for Conditions Caused by School -- Effects of Racial Discrimination, Inappropriate Education, Unmet Special Needs, Etc.;"
§XI.B, "Notice" (see subsection on "Language of Notice");
§XI.F.2, "Right to Interpreter;"
§XIII, "Remedies."

Native Americans

The standards above for discrimination on the basis of race or national origin are fully applicable to discrimination against Native Americans, including the standards relating to the student's primary language. See, e.g., Heavy Runner v. Bremner, 522 F.Supp. 163 (D.Mont. 1981). Not all courts have shown the greatest sensitivity to these issues. See New Rider v. Board of Education, 480 F.2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973), in which a hair-length rule, which was challenged by Pawnee students who wore braids as part of their cultural heritage, was upheld on the grounds that it was needed for "instilling pride"!

Additionally other laws provide specific requirements concerning the education of Native Americans in certain school settings, such as the Indian Education Act (20 U.S.C. §241aa et seq.) and the Johnson O'Malley Act (25 U.S.C. §452 et seq.). See the Center for Law and Education, Indian Education: Selected Federal Statutes and Regulations (1980).

Of particular note are the student rights and due process procedures which have been adopted for all Bureau of Indian Affairs schools and schools operating under contract with the Bureau, and which spell out and elaborate many of the rights discussed elsewhere in this volume. They provide (25 C.F.R. Part 35):

§ 35.3 Rights of the individual student.

Individual students at Bureau of Indian Affairs schools have, and shall be accorded, the following rights:

(a) The right to an education.

(b) The right to be free from unreasonable search and seizure of their person and property, to a reasonable degree of privacy, and to a safe and secure environment.

(c) The right to make his or her own decisions where applicable.

(d) The right to freedom of religion and culture.

(e) The right to freedom of speech and expression, including symbolic expression, such as display of buttons, posters, choice of dress, and length of hair, so long as the symbolic expression does not unreasonably and in fact disrupt the educational process or endanger the health and safety of the student or others.

(f) The right to freedom of the press, except where material in student publications is libelous, slanderous, or obscene.

(g) The right to peaceably assemble and to petition the redress of grievances.

(h) The right to freedom from discrimination.

(i) The right to due process. Every student is entitled to due process in every instance of disciplinary action for alleged violation of school regulations for which the student may be subjected to penalties of suspension, expulsion, or transfer.

§ 35.4 Due process.

Due process shall include:

(a) Written notice of charges within a reasonable time prior to a hearing. Notice of the charges shall include reference to the regulation allegedly violated, the facts alleged to constitute the violation, and notice of access to all statements of persons relating to the charge and to those parts of the student's school record which will be considered in rendering a disciplinary decision.

(b) A fair and impartial hearing prior to the imposition of disciplinary action absent the actual existence of an emergency situation seriously and immediately endangering the health or safety of the student or others. In an emergency situation the official may impose disciplinary action not to exceed a temporary suspension, but shall immediately thereafter report in writing the facts (not conclusions) giving rise to the emergency and shall afford the student a hearing which fully comports with due process, as set forth herein, as soon as practicable thereafter.

(c) The right to have present at the hearing the student's parent(s) or guardian(s) (or their designee) and to be represented by lay or legal counsel of the student's choice. Private attorney's fees are to be borne by the student.

(d) The right to produce, and have produced, witnesses on the student's behalf and to confront and examine all witnesses.

(e) The right to a record of hearings of disciplinary actions, including written findings of fact and conclusions in all cases of disciplinary action.

(f) The right to administrative review and appeal.

(g) The student shall not be compelled to testify against himself.

(h) The right to have allegations of misconduct and information pertaining thereto expunged from the student's school record in the event the student is found not guilty of the charges.

Part 36 contains regulations for student records, extending the more general federal requirements discussed in §XII.A.

Table 1

DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS
1980 ELEMENTARY AND SECONDARY SCHOOLS CIVIL RIGHTS SURVEY
NATIONAL SUMMARY OF PROJECTED DATA
(March 1982) page 3

NUMBER OF DISTRICTS : 11268
NUMBER OF SCHOOLS : 77644

		AM IND	ASIAN	HISP	BLACK	MINORITY	WHITE	TOTAL	MALE	FEMALE	HAND	LEP
ENROLLMENT	: NUMBER	305730	749003	3179345	6418194	10652126	29180415	39832482	20442566	19390396	3319768	934066
	PERCENT	0.8	1.9	8.0	16.1	26.7	73.3	100.0	51.3	48.7	8.3	2.3
EXPULSIONS	: NUMBER	1811	373	13432	26934	42636	95969	138601	98666	39931	3008	N/A
	PERCENT OF TOTAL	1.4	0.3	9.7	19.4	30.8	69.2	100.0	71.2	28.8	2.2	N/A
	PARTICIPATION RATE	5.9	0.5	4.2	4.2	4.0	3.3	3.5	4.8	2.1	0.9	N/A
SUSPENSIONS	: NUMBER	12326	12277	154146	633074	811744	1319044	2130747	1479148	660456	58198	N/A
	PERCENT OF TOTAL	0.6	0.6	7.2	29.7	38.1	61.9	100.0	69.4	31.0	2.7	N/A
	PARTICIPATION RATE	40.3	16.4	48.5	98.6	76.2	45.2	53.5	72.4	34.1	17.5	N/A
CORP PUNISHMENT	: NUMBER	9513	2664	91718	403386	507232	901032	1408206	1134977	273232	48279	N/A
	PERCENT OF TOTAL	0.7	0.2	6.5	28.6	36.0	64.0	100.0	80.6	19.4	3.4	N/A
	PARTICIPATION RATE	31.1	3.6	28.8	62.9	47.6	30.9	35.4	55.5	14.1	14.5	N/A
GIFTED/TALENTED	: NUMBER	3386	39310	48349	93560	184638	840424	1024912	494700	530585	N/A	N/A
	PERCENT OF TOTAL	0.3	3.8	4.7	9.1	18.0	82.0	100.0	48.3	51.8	N/A	N/A
	PARTICIPATION RATE	11.1	52.5	15.2	14.6	17.3	28.8	25.7	24.2	27.4	N/A	N/A
EMR	: NUMBER	5050	2277	25081	214812	247278	308731	555943	334820	221028	N/A	5657
	PERCENT OF TOTAL	0.9	0.4	4.5	38.7	44.5	55.5	100.0	60.2	39.8	N/A	1.0
	PARTICIPATION RATE	16.5	3.0	7.9	33.5	23.2	10.6	14.0	16.4	11.4	N/A	6.1
TMR	: NUMBER	818	1120	7403	26230	35567	59377	94923	54169	40667	N/A	1805
	PERCENT OF TOTAL	0.9	1.2	7.8	27.6	37.5	62.5	100.0	57.1	42.8	N/A	1.9
	PARTICIPATION RATE	2.7	1.5	2.3	4.1	3.3	2.0	2.4	2.6	2.1	N/A	1.9
SPEECH IMPAIR	: NUMBER	5931	13704	60056	136676	216275	687857	904068	568569	335498	N/A	20101
	PERCENT OF TOTAL	0.7	1.5	6.6	15.1	23.9	76.1	100.0	62.9	37.1	N/A	2.2
	PARTICIPATION RATE	19.4	18.3	18.9	21.3	20.3	23.6	22.7	27.8	17.3	N/A	21.5
SER EMOT DIST	: NUMBER	1400	708	11879	46099	60062	122782	182805	142212	40100	N/A	1623
	PERCENT OF TOTAL	0.8	0.4	6.5	25.2	32.9	67.2	100.0	77.8	21.9	N/A	0.9
	PARTICIPATION RATE	4.6	0.9	3.7	7.2	5.6	4.2	4.6	7.0	2.1	N/A	1.7
SPEC LEARN DIS	: NUMBER	12394	10674	102278	201235	326479	934068	1260471	906585	353579	N/A	20118
	PERCENT OF TOTAL	1.0	0.8	8.1	16.0	25.9	74.1	100.0	71.9	28.1	N/A	1.6
	PARTICIPATION RATE	40.5	14.3	32.2	31.4	30.6	32.0	31.6	44.3	18.2	N/A	21.5
BILINGUAL	: NUMBER	15660	115604	642928	6620	780754	49647	830372	N/A	N/A	N/A	N/A
	PERCENT OF TOTAL	1.9	13.9	77.4	0.8	94.0	6.0	100.0	N/A	N/A	N/A	N/A
GRADUATES	: NUMBER	14073	38975	129587	325671	508198	2182036	2690160	1315414	1376680	54657	N/A
	PERCENT OF TOTAL	0.5	1.4	4.8	12.1	18.0	81.1	100.0	48.9	51.2	2.0	N/A
	PARTICIPATION RATE	46.0	52.0	40.8	50.7	47.[illegible]	74.8	67.5	64.3	71.0	16.5	N/A

CHILDREN REQUIRING SPECIAL ED : 3635064
CHILDREN RECEIVING SPECIAL ED : 3580476
CHILDREN ATTENDING ELSEWHERE : 226088
CHILDREN NOT EVALUATED : 193499
CHILDREN NOT RECEIVING SERVICES : 22610

SCHOOLS WITH ACCESSIBLE
ENTRANCES : 56511
RESTROOMS : 42124
SCIENCE LABS : 18266
PUPILS IN WHEELCHAIRS : 34437
ACCESSIBLE CLASSROOMS : 1265839
TOTAL CLASSROOMS : 193539[illegible]

	SINGLE SEX CLASSES		MIXED CLASSES	
	MALES	FEMALES	MALES	FEMALES
HOME ECONOMICS	19754	471518	892860	1604047
INDUSTRIAL ARTS	524778	14773	1922148	851661
PHYSICAL ED	1857276	1415739	5503370	5073582

	MALES	FEMALES	NUMBER OF TEAMS
ALL FEMALE TEAMS		2370058	144836
ALL MALE TEAMS	4082975		194287
TEAMS WITH BOTH SEXES	329390	204644	34262

PARTICIPATION RATE IS THE RATE PER THOUSAND

Guide to the OCR Table

NUMBER: Number of pupils.

PERCENT: Number of pupils expressed as a percentage of the total row. For example, black students make up 29.7 percent of all students suspended (as compared with 16.1 percent of all students enrolled).

PARTICIPATION RATE: Number of pupils expressed as a ratio per 1000 pupils of that type enrolled. For example, of every 1000 black students enrolled, 98.6 were suspended at least once (as compared to 49.5 of each 1000 white students).

GIFTED/TALENTED through BILINGUAL: Pupils enrolled in each of these types of programs. (EMR: educable mentally retarded; TMR: trainable mentally retarded; SER EMOT DIST: seriously emotionally disturbed; SPEC LEARN DIS: specific learning disabled; BILINGUAL: bilingual, high-intensity learning training, English-as-a-second-language, or any non-language class taught in language other than English).

GRADUATES: Pupils who received regular high school diploma.

HAND: Handicapped pupils.

LEP: Limited English Proficiency (pupis in need of bilingual education).

The table is compiled from the survey forms completed by 5058 school systems. It was then statistically projected to provide a picture of the totals for all but the nation's smallest school systems. (See §XII.B for information on these forms.) This report compiles a variety of other "National Summaries" and "State Summaries" tables. In previous years, the Department also published compilations of the individual school system data. For this year, even without the compilation, the individual reports are available as discussed in §XII.B.

The information reported here was for the fall of 1980, except that expulsions, suspensions, corporal punishment, and graduates are totals for the 1979-80 school year.

B. SEX DISCRIMINATION

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

20 U.S.C. Sec. 1681 (Title IX of
the 1972 Education Amendements).

Issues of sex discrimination in discipline have rarely been raised legally thus far except in the context of marriage, parenthood, and pregancy. Disparities in other areas clearly do exist, however, with males generally being disciplined at a much higher rate than females. In some cases, school districts have explicit policies which discriminate (e.g. paddling boys only). For national statistics, see table in appendix to §III.A.

The list of cases addressing sex discrimination in schools outside the discipline area is quite lengthy and rapidly growing (especially concerning athletic participation). That list is beyond the scope of this section, which sets out general legal standards and regulations relevant to discipline.

Equal Protection*

Equal protection analysis for sex discrimination is similar to that for race discrimination in requiring proof of intent in order to establish a classification. See, e.g. Personnel Administrator of Massachusetts v. Feeney, 99 S.Ct. 2282 (1979). Thus, the "intent" analysis in §III.A concerning racial discrimination is relevant. Once a sex-based classification has been established, however, the Supreme Court requires a somewhat lower level of justification than for racial classifications -- instead of "compelling interest," the classification "must serve important government objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190 (1976). For discussion of equal protection standards in the context of a claim that a community college's failure to provide campus child-care facilities limited women's ability to pursue higher education, see De la Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), cert. denied, 99 S.Ct. 2416 (1979).

Title IX

The regulations implementing Title IX recognize that sex discrimination in schools, like race discrimination. can come in many forms 34 C.F.R. Part 106). In addition to regulations dealing with specific subjects, such as admissions, courses, guidance and counseling, and athletics [all beyond the scope of this manual], the regulations contain a set of broader prohibitions which can be relevant in the discipline context:

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*See new Supreme Court opinion on equal protection standards, infra.

> *Specific prohibitions* - Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> (4) *Subject any person to separate or different rules of behavior, sanctions, or other treatment*;
>
> (5) *Discriminate against any person in the application of any rules of appearance*;
>
> (6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;
>
> (7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
>
> (8) Otherwise limit any person in the enjoyment of any right, privilege. advantage, or opportunity.
>
> 34 C.F.R. §106.31(b) (emphasis added)

The regulations require school systems to take remedial action to overcome the effects of prior discrimination [§106.3(a)]; to conduct a self-evaluation of compliance [106.3(c)]; to designate and publicize information concerning a compliance coordinator [106.8(a)]; to establish and publicize complaint procedures [106.8(b)]; and to publicize its policy of non-discrimination to applicants, students, parents, etc. [106.9].

The Supreme Court has held that Title IX creates a private cause of action, allowing people to sue under the law in federal court. *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979). The Court has also stated that Title IX has a program-specific focus, in the sense that the challenged discrimination must be "in" (or must "infect") "a program or activity receiving Federal financial assistance . . . ;" although the Court specifically declined to define "program." *North Haven Board of Education v. Bell*, 102 S.Ct. 1912, 1926-28 (1982).

The Department of Health, Education and Welfare (now the Department of Education) has issued a policy determination that unlawful sex discrimination under Title IX is established when a complaint provides statistical analysis showing disparate treatment which educational officials have not adequately explained. DHEW, "Nondiscrimination in Federally Assisted Programs: Policy Determinations," 43 Fed. Reg. 18630 (5/1/78) (Decision Announcement No. 1). See also De la Cruz, supra. Contra, University of Chicago, 648 F.2d 1104 (7th Cir.), cert. denied, 102 S.Ct. 981 (1981) (Title VI, and therefore Title IX, require proof of discriminatory intent; but see §III.A for critical discussion of this interpretation of Title VI standards).

Cross References

For Title IX regulations concerning specific topics, as well as related cases brough on equal protection or other grounds, see:

§VII.A, "Dress and Grooming;"
§VII.C, "Marriage, Parenthood, Pregnancy."

Other Resources

National Women's Law Center, 1751 N. Street, N.W., Washington, DC 20036, (202) 872-0670;
Project on Equal Education Rights (PEER), 1112 13th Street, N.W., Washington, DC 20005, (202) 332-7337;
Women's Equity Action League (WEAL), 805 15th Street, N.W., Washington, DC 20005 (202) 638-1961;
Women's Legal Defense Fund, 2000 P. Street, N.W., #400, Washington, DC 20036 (202) 887-0364.

See: Kathleen Boundy, "Sex Inequities in Education," 14 Clearinghouse Review 1048 (February 1981).

Mississippi University for Women v. Hogan (Equal Protection Standards)

The Supreme Court has summarized its equal protection standard for sex discrimination in a strongly worded opinion issued at press time. Mississippi University for Women v. Hogan, ___ S.Ct. ___, 50 U.S.L.W. 5068 (7/1/82) (striking down nursing school's women-only admissions policy). Sex-based classifications require an "exceedingly persuasive justification," which demands a showing that there is a "direct, substantial" or "close relationship" to "important governmental objectives," a standard which "must be applied free of fixed notions concerning the roles and abilities of males and females." (5070) "The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification,' Craig v. Boren, 429 U.S. 190, 198, (1976), to establish a link between objective and classification." (5071) The Court found it unnecessary to decide whether sex classifications are inherently suspect. (5070 n. 9)

C. DISCIPLINE OF HANDICAPPED STUDENTS

by Kathleen B. Boundy

The Implications of the Education for All Handicapped Children Act[*] and Section 504 of the Rehabilitation Act[**]

The federal laws safeguarding the rights of students with special needs have implications for disciplining students identified as handicapped, those with evaluations or appeals pending, and students who may be perceived as handicapped, and, in particular, the circumstances under which they can be excluded through disciplinary suspension or other exclusion.

Suspension and expulsion of handicapped students may be illegal under the EHCA, as well as Section §504 of the Rehabilitation Act of 1973, and may be illegal for students referred for evaluation or perceived to be handicapped, on one of the following grounds:

i. the right to a free appropriate public education, which includes specially designed instruction to meet the student's individual needs. 20 U.S.C. §1401(16), (18); 34 C.F.R. §300.1, 300.4, 300.13, 300.14; 34 C.F.R. §104.33(b).

ii. the right to have any change in placement occur only through the prescribed procedures. 20 U.S.C. §1415(b)(1)(C)(D); 34 C.F.R. §300.504(a),(b)(1)(ii); 34 C.F.R. §104.36.

iii. the right to an education in the least restrictive environment with maximum possible interaction with nonhandicapped peers. 20 U.S.C. §1412(5)(B), §1414(a)(1)(C)(iv); 34 C.F.R. §300.132, 300.227, 300.550-553; and 34 C.F.R. §104.34(a).

iv. the right to continuation of the current educational placement during the pendency of any hearing of appeal, or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education. 20 U.S.C. §1415(e)(3); 34 C.F.R. §300.513.

v. the right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status. 29 U.S.C. §794; 34 C.F.R. §104.4(a)(b).

For students who have never been classified as handicapped or referred for evaluation:

vi. the right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status. 29 U.S.C. §794, 34 C.F.R. §104.4(a)(b).

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[*] 20 U.S.C. §1401 et seq. (statute)[hereinafter EHCA]; 34 C.F.R. Part 300 (regulations).

[**] 29 U.S.C. §794 (statute); 34 C.F.R. Part 104 (regulations).

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Background

The rights of children with special needs to receive a publicly supported education and not to be excluded on the basis of their handicaps have been recognized by federal courts on due process and equal protection grounds, e.g. Pennsylvania Association for Retarded Citizens v. Pennsylvania, 334 F.Supp. 1257 (E.D.Pa. 1971)(Consent Decree); modified, 343 F.Supp. 279 (1972); Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (D.D.C. 1972); Harrison v. Michigan, 350 F.Supp. 846 (E.D.Mich. 1972);and on state constitutional and statutory grounds, e.g., In re G.H., 218 N.W.2d 441 (N.D.1974); Frederick L. v. Thomas, 408 F.Supp. 832, 419 F.Supp. 960 (E.D.Pa. 1976), *aff'd*, 557 F.2d 373 (3rd Cir. 1977).

Responding in part to judicial decisions and state legislation, Congress enacted two laws extending and delineating the rights of handicapped students in areas not easily addressed through litigation. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 prohibits discrimination on the basis of handicap; it was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq*. The Education for All Handicapped Children Act of 1975 (P.L. 94-142), 20 U.S.C. §1401 *et seq*. (hereinafter EHCA), which amended the Education of the Handicapped Act (P.L. 94-380; 20 U.S.C. §§1401, 1402, 1411-1420), established a grant-in-aid program for states willing to ensure compliance with its provisions.

The Education for All Handicapped Children Act

The Education for All Handicapped Children Act*, 20 U.S.C. §1401 *et seq*.(EHCA), provides federal aid to reimburse state and local education agencies for a portion of the excess costs of providing special education and related services to students identified as handicapped. No state or local educational agency is eligible for such funding unless the state education agency has submitted a state plan insuring that all handicapped students residing in each respective LEA's jurisdiction are provided all the rights and safeguards of the EHCA. Education agencies are required to provide each handicapped student a free appropriate education designed to meet his/her unique needs. Procedural due process safeguards are required in evaluation and placement decisions, hearings, and appeals.

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, reads as follows:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall solely by reason of his handicap, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any program or activity receiving federal financial assistance.

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*Also known as Public Law 94-142.

Regulations promulgated pursuant to Section 504, 34 C.F.R. Part 104, effective June 3, 1977, state that for purposes of elementary and secondary schools, a "qualified handicapped person" is:

> a handicapped person i) of an age during which nonhandicapped persons are provided such services, ii) of any age during which it is mandatory under state law to provide such services to nonhandicapped persons, or iii) to whom a state is required to provide a free appropriate public education under §612 of the Education of the Handicapped Act. . .34 C.F.R. §104.3(k)(2);

See also 34 C.F.R. §104.3(j).

The regulations prohibit exclusion and other discriminatory actions and require the provision of comparable and equally effective educational benefits and services. As does the EHCA, the regulations implementing §504 include requirements for identification, evaluation and placement, provisions of a free appropriate education, non-academic services, and procedural safeguards.

i. THE RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION

The right to receive a full, free, and appropriate public education is embodied in §504 of the Rehabilitation Act of 1973, the EHCA,and their implementing regulations, 34 C.F.R. §104.33(a)(b); 20 U.S.C. §1401(18); 34 C.F.R. §§300.4, 300.13, 300.14. Handicapped children within the contemplation of the EHCA, 20 U.S.C. §1401(1), have a "right to a free appropriate education" in every state which chooses to receive financial assistance pursuant to its requirements. 20 U.S.C. §1412. See *e.g.*, *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981); *Rowley* v. *Board of Education of the Hendrick Hudson School District*, 632 F.2d 945 (2nd Cir. 1981) affirming 483 F.Supp. 536 (S.D.N.Y. 1980). Courts have also construed §504 to provide a private cause of action for the enforcement of the right of handicapped children to a free appropriate education. *E.g*, *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981); *Tatro* v. *State of Texas*, 625 F.2d 557 (5th Cir. 1980); *Boxall* v. *Sequoia Union High School District*, 464 F.Supp. 1104 (N.D. Cal. 1979).

The federal courts have enjoined school districts from expelling or constructively excluding handicapped students for "misbehavior." In part, these decisions were based on a finding of a violation of a handicapped student's right to a free appropriate education. *Stuart* v. *Nappi*, 443 F.Supp. 1235 (D.Ct. 1978); *Howard S.* v. *Friendswood Independent School District*, 454 F.Supp. 634 (S.D.Tex. 1978); *Doe* v. *Koger*, 480 F.Supp. 225 (N.D.Ind. 1979); *S-1* v. *Turlington*, No. 78-8020-Civ-CA-WPB (S.D. Fla. June 15, 1979), *affirmed*, 635 F.2d 342 (5th Cir. 1981); *Doe* v. *Maher*, No. C-80-4270-MHP (N.D.Cal., Dec. 12, 1980); *Sherry* v. *New York State Education Dept.*, 479 F.Supp. 1328 (W.D.N.Y. 1979). But see, *McCowen* v. *Hahn*, No. 78C 4233 (N.D.Ill., July 27, 1980), 3 EHLR 553:131, 134-135, 135 n.9 (The statutory scheme of the EHCA creates no substantive rights on behalf of individual plaintiffs other than the procedural rights guaranteed by 20 U.S.C.§1415); H.R. v. Hornbeck, 524 F.Supp. 215 (D.Md. 1981).

In Stuart v. Nappi, supra, an injunction was issued prohibiting the expulsion of a learning disabled student with a history of behavioral problems. The court ruled that any non-emergency exclusion, regardless of whether it was for behavior related to the handicapping condition, would deprive a handicapped student of her right to an "appropriate education."

The only instance in which the Stuart court stated that an expulsion is permitted under the EHCA is in an emergency situation necessitated by health, safety or substantial disruption issues. 443 F.Supp. at 1242. An emergency situation is defined as one in which (1) the student is violent and presents an ongoing danger or threat of physical injury to himself/herself or others or where the student's conduct is so disruptive over a lengthy period of time that normal classroom activities cannot possibly continue; and (ii) this ongoing threat of injury or disruption cannot be reduced or eliminated by less exclusionary means. See In re John K., Mass. Dept. Spec. Educ., Div. Spec. Ed. Bureau of Special Ed. Appeals #2494 (a single incident of disruptive behavior - student assault on a teacher - followed by the student's voluntary discussions of the incident with another faculty person cannot sustain a finding that this student is dangerous to himself or others or substantially disruptive).

Other federal courts have held that handicapped students may be subject to short-term non-emergency suspensions for up to 10 days without triggering their rights to the procedural safeguards of 20 U.S.C. §1415. Stanley v. School Administrative Unit No.40, Milford-Mount Vernon, No. 80-9-D, (D.N.H., Jan. 15, 1980)(Proposed 21 day suspension limited by court to 10 days; the evidence did not show that plaintiff's disruptive behavior was caused to a substantial degree by his handicap or by his current placement); Board of Education of the City of Peoria v. Illinois State Board of Education, 531 F.Supp. 148 (C.D. Ill. 1982)(Five day suspension is neither an expulsion from nor termination of special education. "Any theory that some harm of the brief interuption of classroom work could outweigh the educational value of the suspension here can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the degree of handicap, are free of classroom discipline.")

Students facing possible suspension are entitled to procedural due process. Goss v. Lopez, 419 U.S. 565 (1975). Where an emergency situation justifies a delay in the normal hearing procedures for a suspension, a preliminary hearing must be held as soon as practicable, and in no case later than 72 hours after the removal of the student from his/her regular educational placement. See §§IX-XI, "Procedural Rights."

Continuance of the suspension shall be permitted only so long as the emergency situation exists. In no event should a student with an I.E.P. or pending an evaluation of appeal be suspended for more than 10 days cumulatively or consecutively in a school year.

Mattie T. v. Holladay, No. DC-75-31-S (N.D.Miss., July 28, 1977) (granting plaintiff's motion for summary judgment)(memorandum decision and orders)(Clearinghouse No. 15,299), provides that a child may only be removed from a special education program for behavior reasons, regardless of the cause of the behavior, when:

> the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal from school is essential. Such removal shall be for no more than 3 days and shall trigger a formal comprehensive review of the child's I.E.P. If there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED impartial due process hearing. Serial 3-day removals from SPED are prohibited.

To summarize the claim here, (1) the handicapped student has the right to a free appropriate education under the statute; (2) any suspension or expulsion is a deprivation of that education (see Goss v. Lopez, supra, 419 U.S. at 576), regardless of whether the exclusion is for handicapped-related conduct; and (3) therefore, any deprivation of that right to education should be as minimal as possible -- i.e., limited to the emergency exception under Stuart and Mattie T.

ii. THE RIGHT TO HAVE ANY CHANGE IN PLACEMENT OCCUR THROUGH PRESCRIBED PROCEDURES

Parents must be notified in writing within a reasonable time before a school district proposes to change the placement of a handicapped student. 20 U.S.C. §1415(b)(1)(C); 34 C.F.R. §300.504(a); 34 C.F.R. §104.36. The notice must explain all procedural rights available to the parents and describe the proposed action, the basis for the school's decision, other options considered, and the reasons for their rejection. This notice must be comprehensible to the parents, be in the parent's native language unless clearly not feasible, and be otherwise effectively communicated where the parent's mode of communication is not a written language. 20 U.S.C. §1415(b)(1)(D); 34 C.F.R. §300.505.

The members of the child's I.E.P. team must reconvene to review the student's current I.E.P. and to consider other available placement options. 34 C.F.R. §300.533. The school district must make a concerted effort to ensure parental participation, including proper notification of the meeting, agreement in scheduling, alternative means of participation, and actions to insure that the parent understands the proceedings. If warranted, or if the child's parent or teacher requests it, the child for whom a change of placement is being considered shall also be reevaluated. 34 C.F.R. §300.534.

Parental consent is not required in changing the placement of a handicapped student who is receiving special education services to a more restrictive placement. However, the parent,after receiving notice of the proposed change of placement, has a right to complain about the educational placement or the provision of a free appropriate public education to the child. 20 U.S.C. §1415(b)(1)(E). Furthermore, the parent has the right to an impartial hearing concerning any complaint or, inter alia, any proposal to change the placement of his/her child or the provision of a free appropriate public education to such child. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.506(a); 34 C.F.R. §104.36. See Mills (supra) (due process); Hairston v. Drosick, 423 F.Supp. 180 (S.D.Va. 1976)(due process); Howard S., supra (§504 and due process); Mattie T. v. Holladay, No. DC 75-31-S (N.D.Miss., July 28, 1977, granting plaintiffs' motion for summary judgment)(EHCA).

A "change in placement" in the context of the EHCA and its regulations has been construed as an expulsion or other exclusion from the student's educational placement for more than 10 school days in a school year. Stuart v. Nappi, supra, 443 F.Supp. at 1242-43; S-1 v. Turlington, supra, 635 F.2d at 348; Doe v. Maher, No. C-80-4270 (N.D.Cal. Dec. 12, 1980)(state statute limits suspension to 5 days); see also Sherry v. New York State Education Dept., 479 F.Supp. 1328 (W.D.N.Y. 1979)(Indefinite suspension of a legally blind and deaf student who suffered from brain damage and emotional disorder which made her self-abusive constituted a change in educational placement within the meaning of §1415); Doe v. Koger, 480 F.Supp. 225 (N.D.Ind. 1979)(Indefinite suspension pending formal expulsion is a change in placement in violation of EHCA); Blue v. New Haven Board of Education, Civ. No. N81-41 (D.Conn. March 23, 1981)(Exclusion for more than 10 consecutive days is tantamount to expulsion; plaintiff is being denied his right to remain in his current educational placement during the pendency of his special education complaint). See §VIII.D. ,"Disciplinary Transfer," p.316.

Referring to the statutory provisions described above, the Stuart court noted that the EHCA prescribes a procedure for transferring disruptive students to more restrictive placements when their behavior significantly impairs the education of other children. Any change in a handicapped student's placement must be made by a professional team with parental participation, after consideration of the range of available placements and the student's particular needs. 443 F.Supp. at 1243. Accordingly, the court ruled that the "expulsion of handicapped children . . .is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children." 443 F.Supp. at 1243. As noted above, the Act does not preclude school authorities from dealing with emergency situations by suspending handicapped students. 443 F.Supp. at 1242-43.

Agreeing with the principles set forth by the district court in Stuart, the Court of Appeals in S-1 expressly held that "a termination of educational services, occasioned by an expulsion, is a change in educational placement, thereby invoking the procedural protections of the [EHCA]." S-1 v. Turlington, supra at 348.

The Court of Appeals further stated that an "expulsion is still a proper disciplinary tool under the [EHCA] and Section 504 when the proper procedures are utilized and under the proper circumstances." Id. at 348. However, educational services must, the court emphasized, continue to be provided during the expulsion period.

The apparent ambiguity between these latter two rulings can be clarified. "Expulsion," as the term is used by the court, refers to any exclusion or removal of a handicapped student from his/her current educational placement. This definition is consistent with the appellate court's ruling that an expulsion constitutes a change in education placement triggering the procedural protections of the EHCA. Any attempt by school districts to argue that the court's ruling permits their providing only homebound tutoring should be susceptible to challenge. In most instances, school districts will be unable to show that the student is being provided an appropriate education in the "least restrictive environment" as required under the change in placement procedures. See, e.g. Blue v. New Haven Board of Education, supra (defendants' action of placing plaintiff on homebound instruction pending an expulsion hearing deprives him of his right to an education in the least restrictive environment and imposes a severe limitation on plaintiff's academic and social development

To summarize the claim here, exclusion beyond ten days, regardless of the reason, is sufficiently lengthy to amount to a removal from the student's current placement, and can therefore be accomplished only through the proper change-in-placement procedures, including a determination that the current placement is no longer the least restrictive (see iii), development of a new plan for appropriate education in the least restrictive environment, and protection of educational status pending the proceedings (see iv).

iii. THE RIGHT TO AN EDUCATION IN THE "LEAST RESTRICTIVE ENVIRONMENT"

Both the EHCA and §504 guarantee handicapped students the right to participate in regular classroom and extracurricular activities with non-handicapped students to the greatest extent practicable while receiving an appropriate education. 20 U.S.C. §§1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§300.132, 300.227, 300.550-.553, 34 C.F.R. §104.34, 104.4(b)(1)(iv)(3). The EHCA,which describes this right in terms of the "least restrictive environment," requires assurance by state and local education agencies that "special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The language of 34 C.F.R. §104.34(a) is very similar.

The importance of this right to be "mainstreamed" to the greatest extent practicable has been recognized by the courts. In Hairston v. Drosick, supra, the court found that the exclusion of a handicapped child from a regular classroom, except as a last resort where the educational needs of a child cannot otherwise be met, violates the provisions of §504.

> It is an educational fact that the maximum benefits to a child are received by placement in as normal an environment as possible. . .A child has to interact in a social way with its peers and denial of this opportunity during his minor years imposes added lifetime burdens upon a handicapped individual. 423 F.Supp. at 183-84.

See also P.A.R.C., supra, 343 F.Supp. at 307; Mills, supra, 348 F.Supp. at 880; Campbell v. Talldega County Board of Education, 518 F.Supp. 47, 55-56 (N.D.Ala. 1981); Brown v. D.C. Board of Education, C.A. No. 78-1646 (D.D.C. 1978); 3 EHLR 551:101.

Courts have relied on the "least restrictive environment" requirement as a basis for enjoining disciplinary or other exclusionary proceedings against handicapped students. Stuart v. Nappi, supra, 443 F.Supp. at 1240, 1242-43; Howard S. v. Friendswood Indep.Sch. Dist., supra, 454 F.Supp. at 642; Blue v. New Haven Board of Education, supra, Slip.Op. 11, 16-17, 18-19. See also P-1 v. Shedd, C.A. No. H-78-58, D.Conn. (Consent Decree, March 23, 1979); 3 EHLR 551:165; Mattie T. v. Holladay, C.A. No. DC-75-31-S, N.D.Miss. (Consent Decree, February 22, 1979). Cf. Southeast Warren Community School District v. Department of Public Instruction, No. 231/63181 (Sup. Ct. Iowa 1979)(LEA authorized by state statute to expel handicapped student provided certain procedures are followed prior to expulsion, including re-evaluation of student by diagnostic team, report and recommendation of team to school board, and following full hearing by school board, a determination as to whether an alternative placement will meet needs of student. Expulsion is last resort when no reasonable alternative placement is available. Slip.Op. 12-13).

In Stuart v. Nappi, supra, the court determined that plaintiff, if expelled, would suffer irreparable harm because she would be precluded from participating in any special education programs offered at the school. Her placement options would, the court indicated, be restricted to private school or to homebound tutoring. The court expressed concern that if the former were unavailable, plaintiff's education would be reduced to homebound tutoring, which "can only serve to hinder plaintiff's social development and perpetuate the vicious cycle in which she is caught." Id. 443 F.Supp. at 1240. See also S-1 v. Turlington, supra, 635 F.2d at 348; Blue v. New Haven Board of Education, supra, Slip.Op. 16-19.

The court specifically noted that the Handicapped Act establishes procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive. The comment to 34 C.F.R. §300.552 concerning least restrictive placements quotes the analysis of the §504 regulations, 34 C.F.R. Part 104- Appendix A, subpart D, para.24 [34 C.F.R. §104.34] which states:

> . . .it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs. . .

The court ruled that the right to a "least restrictive environment" is implemented, in part, by requiring schools to provide a continuum of alternative education placements, through which each child receives an education appropriate to his/her individual needs while maximizing interaction with non-handicapped peers. Therefore, the court determined that expulsion would deny plaintiff, a handicapped student, her right to interact with her peers in an education program in the least restrictive environment. The court stated:

> An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. Id. 443 F.Supp. at 1242-43.

The Stuart court held that the provisions requiring a free appropriate education in the least restrictive environment foreclosed expulsions and limited suspensions to emergency situations; and in no case could a student be excluded for more than 10 days without constituting a change of placement to be effectuated in accordance with the prescribed procedures of the EHCA, 20 U.S.C. §§1415(b)(1)(C), 1415(b)(1)(D); 34 C.F.R. §§300.504(a), 300.505, 300.533, 300.534. See Doe v. Koger, supra, at 228 (school receiving EHCA funds is prohibited from expelling students whose handicaps cause them to be disruptive; it is allowed to transfer the disruptive student to an appropriate, more restrictive environment).

An emergency situation indicates that issues of health, safety, or substantial disruption are involved, i.e., a child is dangerous to himself or others, or his/her behavior is ongoing and so disruptive that it is significantly impairing the education of other children in the classroom. In this limited instance, school officials are not precluded from suspending a student (see comment to 34 C.F.R. §300.513; 42 Fed.Reg. 42,473, 42,496 [1977]), but not for more than 10 school days in an academic year. Moreover, for an emergency suspension to be warranted, all less restrictive alternatives for dealing with the handicapped child must have been considered, tried, or rejected as inappropriate. (See 34 C.F.R. §300.505). To comply with the least restrictive environment requirements, an emergency exclusion must be the last resort for eliminating the substantial disruption or the danger to health or safety.

iv. THE RIGHT TO CONTINUE IN ONE'S CURRENT EDUCATIONAL PLACEMENT DURING ANY PROCEEDING CONDUCTED PURSUANT TO 20 U.S.C. §1415

Section 20 U.S.C. §1415(e)(3) of the Handicapped Act states:

> During the pendency of *any proceedings conducted pursuant to this section*, unless the state or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed. (emphasis added).

This section includes provisions concerning any proposal to initiate or change or refusal to initiate or change the identification, evaluation, or placement of the child or the provision of a free appropriate public education. 20 U.S.C. §1415(b)(1). It also provides that a parent is entitled to complain "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. §1415 (b)(1)(E); that the parent has a right to a hearing concerning any complaint or, alternately, concerning any proposal to initiate or change or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education. 20 U.S.C. §1415(b)(2). Other provisions concern procedural safeguards, appeals and judicial actions.

Based on the statutory language of 20 U.S.C. §1415(e)(3), quoted above, it seems clear that the right to remain in one's current educational placement encompasses children once they are referred for an evaluation though they have not been identified as handicapped under the Act. However, the regulation [34 C.F.R. §300.513] is underinclusive in requiring that the *status quo* be maintained "[d]uring the pendency of any *administrative or judicial proceeding* regarding a complaint unless the parents of the child agree otherwise. . ." (emphasis added)

Public policy favors the statutory construction. Given the purpose and intent of the law and the nature and scope of the evaluation requirements, it makes no sense to change the placement of a student who has been referred for an evaluation for special education services during the evaluation process. See *Rodriguez* v. *Bd. of Ed. of Cato-Meridian Central School District*, C.A. No.80-CV-100T (N.D.N.Y., Dec. 18, 1980)(TRO issued prohibiting LEA from excluding epileptic plaintiff not referred or classified from current placement); but see, *Mrs. A.J. v. Special School District No. 1,* 478 F.Supp. 418 (D.Minn. 1979)(15 day suspension of student with evaluation pending).

A complaint filed under 20 U.S.C. §1415(b)(1)(E), whether challenging the suspension of a student who has been referred for an evaluation under the EHCA or §504, or the identification, evaluation or program of said student, entitles the parent to a hearing. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.506(a); 34 C.F.R. §104.36. And during the pendency of the complaint proceedings, the child is entitled to continue in his/her current educational placement. 20 U.S.C. §1415(e)(3); 34 C.F.R. §300.513; *Howard S.* v. *Friendswood Indep. Sch. Dist.*, *supra*, 454 F.Supp. at 642; *Stuart* v. *Nappi*, *supra*, 443 F.Supp. at 1241-42, *Blue* v. *New Haven Bd. of Educ.*, *supra*, Slip.Op. 13-15; cf. *Mrs. A.J.* v. *Special School District No. 1*, *supra*, 478 F.Supp. at 432 n.13 (parental objection to change in placement required by state law not filed; nor a complaint under §1415 to challenge suspension).

The conflict between 20 U.S.C. §1415(e)(3) and the disciplinary procedures of public schools is addressed by DHEW in a comment to the regulations. In essence this comment states that while a child's placement may *not* be changed during the pendency of any complaint proceedings, a school district is not precluded from using its normal procedures for dealing with children who are endangering themselves or others. [See comment to 34 C.F.R. §300.513, 42 Fed.Reg. 42,473, 42,512 (1977)]. Acknowledging that suspensions may be imposed to deal with emergency situations involving health, safety or substantial disruption issues, the *Stuart* court expressly found "no indication in either the regulations or the comments thereto that schools should be permitted to expel a handicapped child while a special education complaint is pending." 443 F.Supp. at 1242. On the other hand, an emergency suspension will not constitute a change of placement under the EHCA, provided that no student is excluded under the emergency provisions for more than 10 school days cumulatively in a school year. See also *S-1* v. *Turlington*, No. 78-8020-Civ-CA-WPB (S.D.Fla., June 15, 1979); 3 EHLR 551:211, 213 (disciplinary proceedings do not supersede the rights of handicapped students under the EHCA), *affirmed*, 635 F.2d 342.

To summarize the claim here, during the pendency of any proceedings (including change-of-placement proceedings), the student should remain in his/her current placement, except under the emergency conditions described above.

v. RIGHT NOT TO BE PUNISHED ON THE BASIS OF HANDICAP OR FOR THE SCHOOL'S FAILURE TO PROVIDE AN APPROPRIATE EDUCATION

School authorities may not apply suspension policies or other disciplinary sanctions to handicapped students or students referred for evaluation when the conduct for which the measures are being considered is an element of, or related to, the student's handicap or is the result of an inappropriate or inadequate educational program or placement. Any such action would be challengeable under the statutory entitlements of the EHCA, the nondiscrimination provisions of §504, and the equal protection and due process clauses of the Fourteenth Amendment.

(a) CONDUCT RELATED TO HANDICAPPING CONDITION

When a suspension or disciplinary sanction is challenged by a student classified as handicapped or referred for evaluation on the basis of his/her statutory entitlements (described in #'s i-iv *supra*), it should be argued that it is not necessary to demonstrate or prove a nexus between the student's conduct and his/her handicapping condition. See *Stuart* v. *Nappi*, *supra*; *Howard S.* v. *Friendswood Indep. School District*, *supra*. But see, *S-1* v. *Turlington*, 635 F.2d at 348-349; *Doe* v. *Koger*, 480 F.2d at 229 ("Before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. . .and this issue must be determined through the change in placement procedures required by the Handicapped Act.")

The *Stuart* court determined that any exclusion except in an emergency situation constituted a denial of the plaintiff's right to free appropriate public education regardless of whether the student's conduct was related to her handicapping condition. In S-1 v. Turlington, the lower court found it unnecessary to determine whether a handicapped student may ever be expelled for misconduct unrelated to his handicap. However, the Court of Appeals ruled that expulsion is "a proper disciplinary tool" under the EHCA and §504, but only when the change of placement procedures have been complied with. (See ii above). The court emphasized that an appropriate education must continue to be provided during the period in which the child is excluded from his/her current educational program. Moreover, the court ruled,the burden is on state and local school officials to raise the question of whether a student's misconduct is a manifestation of his/her handicap. Id. 635 F.2d at 348-49.

Strategically, plaintiffs classified as handicapped or referred for evaluation should always challenge disciplinary suspensions or other sanctions on the basis of their statutory entitlements (following the court's analysis in Stuart, supra). However, when a strong nexus exists, the student should also argue under §504, 29 U.S.C. §794, that s/he is being discriminated against on the basis of his/her handicap. For example, children who have been identified as emotionally disturbed may be less able to control frustration or anger than other children and may engage in disruptive behavior, interrupt and challenge authority figures; children who are mentally retarded may have poor social adjustment skills which are related to their handicap.

Section 504 of the Rehabilitation Act prohibits by its very terms any recipient of federal financial asssistance from discriminating against a handicapped person [or a person considered or treated as handicapped] on the basis of his/her handicap. 29 U.S.C. §794, 34 C.F.R. §104.3(j). Regulations implementing §504 make clear that no handicapped person should be denied an appropriate education "regardless of the nature and severity of the person's handicap," 34 C.F.R. §104.33(a); see Hairston v. Drosick, supra, 423 F.Supp. at 184; Mattie T. v. Holladay, C.A. No. 75-31-S (N.D.Miss., July 28, 1977)(memorandum decision and orders); Howard S. v. Friendswood Indep. Sch. District, supra; that an "appropriate education" must be designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . ," 34 C.F.R. §104.33(b); and that such education must be provided with non-handicapped students to the "maximum extent appropriate." 34 C.F.R. §104.35. While these provisions reflect the legislative intent not to treat handicapped persons disparately, other implementing regulations contain explicit nondiscrimination language. Specifically, 34 C.F.R. 104.4(b)(1) provides that a school may not on the basis of handicap:

> i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service.
> vii) . . . limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or services.

In S-1 v. Turlington, the school defendants conceded that handicapped students cannot be expelled for misconduct which is a manifestation of the handicap itself, but argued that this principle be limited to those students classified as "seriously emotionally disturbed." The district court ruled that "such a generalization is contrary to the emphasis which Congress has placed on an individualized evaluation and consideration of the problems and needs of handicapped students." Id., pp. 3-4. No adequate determination, the court noted, was ever made as to whether such a relationship existed between the handicaps of the expelled plaintiffs and their behavioral problems. Only in the instance of one of the 7 expelled students had a finding been made that his misconduct was unrelated to his handicap. The court noted, however, that this determination was made by school board officials "who do not have the expertise necessary to make such a determination." Id., p. 4; affirmed, 635 F.2d at 346-47. Compare Stanley v. School Administrative Unit No. 40, supra, 3 EHLR 552:390, 395 (The court is unable to conclude that plaintiff will succeed on his substantive statutory claim that his suspension constitutes discrimination on the basis of handicap since plaintiff was having family problems at the time of the disciplinary problems preventing the court from being able to conclude his disruptive behavior was "caused to any substantial degree by his handicap or by his current placement program").

N.B. §VII.E. "Conditions Beyond the Student's Control."

Congress provided that each state and local educational agency accepting federal funds for the education of the handicapped children must have a plan which insures that each handicapped child is evaluated. 20 U.S.C. §§1412(2)(C), 1414(a)(1)(A); 34 C.F.R. §300.128, 300.220; 34 C.F.R. §104.32. Evaluations must be comprehensive, assessing "all areas related to the suspected disability, including. . .social and emotional status." 34 C.F.R. §300.532(f); 34 C.F.R. §104.35(b). The regulations also state that "[i]n interpreting evaluation data and in making placement decisions, each public agency shall . . .draw upon information from a variety of sources, including. . .adaptive behavior." 34 C.F.R. §300.533(a)(1); 34 C.F.R. §104.35(c).

The educational program for each child must include any related services necessary for the child to be able to benefit from special education. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R §104.33. Necessary related services include counseling services, 20 U.S.C. §1401(17), which federal regulations define as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel." 34 C.F.R. §300.13(b)(2). Related services include, therefore, services designed to help handicapped students with behavioral problems.

Certain handicapping conditions are characterized in part by behavioral difficulties. Federal regulations define "mentally retarded" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance." 34 C.F.R. §300.5(b)(4). "Seriously emotionally disturbed" is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance: . . . inappropriate types of behavior or feelings under normal circumstances." 34 C.F.R. §300.5 (b)(8)(i)(C). Therefore, an individualized educational program must address the child's behavioral needs as well as other special needs.

Because an appropriate educational program must be responsive to the unique needs of each student's handicapping condition, the participants of each student's I.E.P. team should consider possible behavioral manifestations of the child's handicap. Accordingly, no in-school disciplinary sanctions should be imposed which are inconsistent with the conclusions and recommendations set forth in the I.E.P. See Pratt v. Board of Education of Frederick County, 501 F.Supp. 232 (D.Md. 1980) Herein plaintiff, an emotionally disturbed student who had been suspended many times for numerous disciplinary infractions sought to require defendants school officials to develop an I.E.P. including, inter alia, an individualized disciplinary program. Action was marked closed and deemed dismissed without prejudice after colloquy in which parties agreed to prepare an I.E.P. addressing plaintiff's individual disciplinary needs. See §VII.E., "Conditions Beyond the Student's Control."

(b) CONDUCT RESULTING FROM INAPPROPRIATE EDUCATIONAL PROGRAM/PLACEMENT

School authorities may not consistent with the federal statutes impose disciplinary sanctions on students for conduct which may be a result of the school's own failure to have provided an appropriate educational program or placement.

The court in Stuart v. Nappi, supra, recognized that the school's "handling of the plaintiff may have contributed to her disruptive behavior." Id., at 1241. Frederick L. v. Thomas, 408 F.Supp. 832, 835 (E.D.Pa. 1976) (argument that inappropriate educational placement caused anti-social behavior raised); Doe v. Koger, supra, 480 F.Supp. at 229 ("For an appropriately placed handicapped child, expulsion is just as available as for any other child; expulsion of a handicapped child may not be considered until it has been established that the disruptive behavior is not the result of an inappropriate placement.) The Stuart court stated: "If a subsequent [evaluation and placement team] were to conclude that plaintiff has not been given an appropriate special education placement, then the defendants' resort to its disciplinary process is unjustifiable." Id. at 1241. See also Howard S. v. Friendswood Independent School District, supra, 454 F.Supp. at 640 ("the fact that [plaintiff] was not afforded free, appropriate public education during the period from the time he enrolled in high school until December of 1976, was, this Court finds, a contributing and proximate cause of his emotional difficulties and emotional disturbance.") See §III.A., pp. 113-116, for an analoguous discussion about the link between racial disparities in discipline and an inadequate educational environment; also §VII.E.3, "Punishment for Conditions Caused by the School -- Effects of Racial Discrimination, Inappropriate Education, Unmet Special Needs, Etc."

(c) PERSONAL CULPABILITY AND STATUS

Punishing a student for conduct which is related to his/her handicap or for the school's failure to provide an appropriate program/placement designed to meet his/her unique needs violates the student's right not to be punished in the absence of personal guilt. In *St. Ann* v. *Palisi*, 495 F.2d 423 (5th Cir. 1974) the court held that it was a denial of substantive due process to suspend and transfer a student to another class because her mother had assaulted her teacher. The court rejected arguments alleging that the school's action was non-punitive and justifiable as a means of restoring order and protecting the teacher's authority. The court expressly stated: "Traditionally, under our system of justice punishment must be founded upon an individual's act or omission, not from his status, political affiliation or domestic relationship." *Id.*, at 425. See *Howard S.* v. *Friendswood Indep. Sch. District*, *supra*, 454 F.Supp. at 638; *Hairston* v. *Drosick*, *supra*, 423 F.Supp. at 182-83 (handicapped child's right to education could not be conditioned on her mother's presence at school); *Sherry* v. *New York State Education Dept.*, *supra*, 479 F.Supp. at 1339 (handicapped plaintiff's indefinite suspension was unlawful and cannot be justified by defendants' concern for her safety; such concern could have been eliminated had defendants provided the necessary supervision as part of plaintiff's appropriate education program); *Debra P.* v. *Turlington*, 474 F.Supp. 244, 267 (M.D.Fla. 1979)(students who have been victims of segregation, social promotion and other educational ills should not at this late date be denied diplomas for having failed a new functional literacy test); *Doe* v. *Koger*, *supra*, 479 F.Supp. at 229.

Courts have also held that it is a violation of equal protection to penalize persons for their status or characteristics for which they have no control. See, e.g., *Weber* v. *Aetna Casaulty & Surety Co.*, 406 U.S. 164, 175 (1972)(illegitimacy); *Harper* v. *Virginia Board of Education*, 383 U.S. 663 (1966)(indigency). Also, *Plyer* v. *Doe*, 50 U.S.L.W. 4650 (6/15/82)(parents' conduct or alien status) discussed in §VII.E., "Conditions Beyond the Student's Control."

vi. THE RIGHTS OF STUDENTS NEVER CLASSIFIED AS HANDICAPPED OR REFERRED FOR EVALUATION NOT TO BE DISCRIMINATED AGAINST

(a) STUDENTS WHO ARE HANDICAPPED

Many students who engage in persistent misbehavior are in fact handicapped under the definitions of the EHCA, §504 of the Rehabilitation Act, or state statutes which may be broader in scope. Schools may label such students as "behavioral problems" for purposes of excluding them from the regular education program through suspension, expulsion, or transfer to so-called alternative education programs (e.g. for the "socially maladjusted.") See 34 C.F.R. §300.5(b)(8)(ii)). By labelling such students as "behavior problems" instead of referring them for evaluations, schools may seek to obviate the requirements of the federal handicap statutes. Nevertheless, it should be argued that it is illegal to suspend or expel any student for misbehavior - with the sole exception of an emergency suspension - if the student who has never been identified as handicapped or referred for an evaluation is in fact handicapped. Stuart v. Nappi, supra; Rodriguez v. Board of Education of the Cato-Meridien Central School District, C.A. No. 80-CV-100T (N.D.N.Y.) (TRO 12/18/80); but see Mrs. A.J. v. Special School District No. 1, 478 F.Supp. 418 (D.Minn. 1979).

State and local education agencies are required to identify, locate and evaluate all handicapped children residing within their jurisdictions. 20 U.S.C. §§1412(2)(C), 1414(a)(1)(A); 34 C.F.R. §§300.128, 300.220; 34 C.F.R. §104.32. Frederick L. v. Thomas, 556 F.2d 373 (3rd Cir.1977); (court order requiring school district to submit plan for identification of handicapped students under state law); Panitch v. Wisconsin, 444 F.Supp. 320 (E.D.Wis. 1977)(state's failure to insure that handicapped children were identified and provided special education violated equal protection); Mattie T. v. Holladay, No. DC 75-31-S (N.D.Miss., July 29, 1977)(absence of an adequate plan to locate and identify handicapped children throughout the state, in violation of EHCA). All children needing special education and related services must receive full and individualized evaluations of their needs. 20 U.S.C. §§1412(a)(C), 1414(a)(1)(A); 34 C.F.R. §§300.128(a)(1), 300.220; 34 C.F.R. §104.35.

Any non-emergency suspension or expulsion of a handicapped student who has not been identified or evaluated would arguably violate the student's right to a free appropriate public education in the least restrictive environment. Stuart v. Nappi, supra; Howard S., supra; S-1 v. Turlington, supra. In addition, school officials upon suspending, expelling, or otherwise disciplining a student with behavior problems who is handicapped and when the school has failed to provide an appropriate education, would be punishing the student for their failure to provide him/her with an appropriate education in violation of the EHCA and §504. See Howard S. v. Friendswood Indep.Sch.Dist., supra, 454 F.Supp. at 640; Stuart v. Nappi, supra, 443 F.Supp.at 1241-42; Doe v. Koger, supra, 480 F.Supp. at 228-29; see also St. Ann v. Palisi, supra, 495 F.2d at 425-26.

In Rodriguez v. Board of Education of the Cato-Meridian Central School District, supra, plaintiff, who suffers from a brain dysfunction resulting in epileptic-type seizures, sought to enjoin school officials from excluding him from school on the basis of his handicapping condition and denying him a free appropriate education. Plaintiff, who had been involved in a confrontation with the principal, alleged that as a result of his condition and the medication he takes to control his seizures, he has difficulty controlling his temper when under emotional stress and that such stress increases the frequency of the seizures. Though defendants were aware of the plaintiff's condition, the complaint alleged that they had never referred him for an evaluation as a handicapped child nor attempted to provide him with an individualized educational program to address his unique needs. Plaintiff's school record during the 1 1/2 years preceeding his complaint being filed, reflected several instances when he was suspended from school for losing his temper.

The court issued a TRO restraining the defendants from taking any action to further exclude plaintiff from his regular school program pending a hearing for a preliminary injunction. The defendants, having convened the district Committee on the Handicapped (COH) to evaluate plaintiff's condition and to make recommendations concerning an appropriate educational program, stipulated with plaintiffs to continue to be bound by the TRO, notwithstanding its lapse, pending final determination by the COH, and any administrative or judicial review thereof. But see Reineman v. Valley View Community School District #365-U, 527 F.Supp. 661 (N.D.Ill. 1981)(school defendants' motions to dismiss claim concerning "change in educational placement" granted; parents of handicapped student, who was suspended prior to being classified handicapped, could not seek damages under §504 for alleged wrongful exclusion from benefits of EHCA, specifically, failure of defendants to timely classify their son as handicapped; handicapped student who allegedly was not properly classified as handicapped under EHCA, had no constitutional right to proper classification).

(b) STUDENTS WHO HAVE SERIOUS BEHAVIOR DIFFICULTIES AND ARE TREATED AS IF HANDICAPPED

Students with serious behavioral difficulties, who may or may not be in need of special education, but who are denied the opportunity to participate in regular education programs because they are treated as, or perceived as handicapped are protected by Section 504 of the Rehabilitation Act of 1973.

The statutory definition of a handicapped individual is notable for its breadth. [29 U.S.C. §706 as amended by §111(a) of the Rehabilitation Act Amendments of 1974]. It is reiterated in essence in the D.H.E.W. regulations implementing §504 at 34 C.F.R. §104.3(j);

> "Handicapped person." (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

These general categories are further defined under §104.3(j)(2)(i)-(iv):

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (ii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

In determining who is handicapped Section 504, as the EHCA, relies on general categories, but in addition, examines whether a student functions as though s/he were handicapped, or if the public agency receiving federal assistance acts as if the student were handicapped. Pursuant to this broader definition, students who have never been classified as handicapped or referred for an evaluation may, nonetheless, be protected by §504.

A student whose behavior is sufficiently serious to warrant exclusion from school for a lengthy period of time is arguably being treated by school officials as if s/he were "handicapped." Substantive due process requires that the punishment imposed for behavior problems in school be reasonably related to a public school's obligation under the education clause of its state constitution and state statutes (including compulsory education laws) to educate all children. The school's interest in excluding a student for a lengthy period of time must outweigh the student's right to be educated under state law, e.g., Cook v. Edwards, 341 F.Supp. 307 (D.N.H. 1972). Furthermore, any serious disparity between the offense and the punishment imposed may be challengeable as a violation of substantive due process. It can be argued, therefore, that unless the student had an ongoing problem of sufficient seriousness to warrant long-term exclusion, the exlusion is invalid. If the student's behavioral difficulties are, in fact, so severe, as to warrant such a harsh penalty, the student may come within the categorical definitions of handicapped under §504 or the EHCA (e.g., seriously emotionally disturbed; mental/emotional illness which limits his ability to learn) or, is at least being treated by the school as if he were seriously emotionally disturbed. [34 C.F.R. §104.3(j)(2)(iv)]

This argument may be buttressed by examining the student's record for notations reflecting the manner in which s/he is perceived by school authorities (e.g., "incorrigible," "amoral," "emotionally maladjusted," "disruptive"). [34 C.F.R. §104.3(j)(2)(iii))] By identifying and labelling students as "behavior problems," schools may be establishing a basis for removing/excluding students from the regular school program without complying with the substantive provisions of the EHCA. P-1 v. Shedd, No. H-78-58, D.Conn. (Consent Decree, 3/23/79)(Provision requiring that student whose misbehavior is so great that s/he is suspended as many as 15 days in one school year or recommended for expulsion should be referred for evaluation); Rodriguez v. Board of Education of the Cato-Meridian Central School District, supra. Compare Reineman v. Valley View Community School District #365-U, supra, 527 F.Supp. at 663.

Because §504 does not rely strictly on categorical labels (i.e. mentally retarded, seriously and emotionally disturbed, learning disabled) in defining who is handicapped, as a general policy matter the effect of identifying children with serious behavioral difficulties, which have resulted in their long-term exclusion from school as handicapped under this theory (perceived as or treated as handicapped by the school), may not be as stigmatizing as would be the identification process under the EHCA.

Another example in which students are treated as handicapped but are functionally excluded from receiving an appropriate education concerns the use of alternative educational programs. Some states have established alternative education programs for students with behavior problems who are stigmatized and labelled "socially maladjusted" because this category is expressly excluded from the categorical definition "seriously emotionally disturbed." [34 C.F.R. §300.5(b)(8)(ii)]. Although these programs function as separate special education programs, the school districts ignore all evaluation, programming, and placement requirements of the federal statutes. See Lavon M. v. Turlington, No. 81-6044-Civ-CA, First Amended Complaint 6/12/81; Order (denying motion to dismiss claims for equitable and declaratory relief and granting in part, denying in part motions to dismiss claims for damages), Jan. 8, 1981.

Under these circumstances an argument can be made that these students are being treated as handicapped by school authorities and thus, are entitled to the protections of §504. Once it is established that these students come within the broad definition of §504, they are entitled to its nondiscriminatory provisions. 34 C.F.R. §104.4(b).

It may be argued that students excluded from school who have never been classified as handicapped or evaluated, should be provided an appropriate, alternative education. This argument is based on the theory that schools in excluding such students for behavioral reasons are treating them as if they are handicapped. These students arguably come within the broad definition of 34 C.F.R. §104.3(j) because they have records of being handicapped (e.g., an emotional disorder) or are treated as handicapped by the school, and are entitled to the protections of §504, including the right not to be denied an appropriate education and to be provided alternative educational opportunity during any suspension or other exclusion from school. See Mills v. Board of Education, supra, 343 F.Supp. at 882-883.

Cross-References

See also the following sections:

§VII.C.	"Marriage, Parenthood, Pregnancy"
§VII.E.	"Conditions Beyond the Student's Control"
§VIII.A.	"Exclusion"
§VIII.D.	"Disciplinary Transfer" (substantive)
§VIII.K.	"Behavior-Modifying Drugs"
§X.C.	"Disciplinary Transfer" (procedural)

1. EXCLUSION OF HANDICAPPED STUDENTS FROM EXTRACURRICULAR ACTIVITIES

The federal requirements, discussed in parts iii and v of §III.C. above, for mainstreaming and for not discriminating against handicapped students apply to extracurricular activities. Thus the regulations under the Education for All Handicapped Children Act provide:

> [34 C.F.R.] §300.553 Nonacademic settings.
>
> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

The regulations under §504 of the Rehabilitation Act provide:

> [34 C.F.R.] §104.37 Nonacademic services.
>
> (a) General. (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
>
> (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational activities, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.
>
> (b) Counseling services. A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.
>
> (c) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.
>
> (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different

from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34* and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

Moreover, HEW Policy Interpretation No. 5, issued under authority of §504, states that students who have lost an organ, limb, or appendage but are otherwise qualified may not be excluded from contact sports, and, if the school system provides insurance coverage for its athletes, it must make such coverage available to handicapped athletes. 43 Fed.Reg. 36034 (August 14, 1978). Before this policy was issued, three court decisions held that a school may exclude students from contact sports where medical testimony establish that their handicaps create a real danger.

Spitaleri v. Nyquist, 74 Misc.2d 811, 345 N.Y.S.2d 878 (1973) (blindness in one eye);
Colombo v. Sewanhaka Central H.S. Dist., 383 N.Y.S.2d 548 (1976) (hearing impairment);
Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977) (blindness in one eye).

Contrast these cases with decisions which have upheld the rights of such students to participate in contact sports:

Evans v. Looney, C.A. No. 77-6052-CV-SJ (W.D.Mo., consent judgment, 9/2/75) (exclusion from participation of college students blind in one eye was a denial of equal protection and due process);
Borden v. Rohr, No. C2-75-844 (S.D.Ohio, 12/30/75) (university student blind in one eye).
See: Neeld v. American Hockey League, 439 F.Supp. 459 (W.D.N.Y. 1977) (blindness in one eye not adequate grounds for exclusion from professional hockey under state human rights law in absence of showing that league's vision requirements were a bona fide occupational qualification).

But see Wolff v. South Colonie Central School District, 534 F.Supp. 758 (N.D.N.Y. 1982), in which plaintiff, a student with a congenital limb deficiency, sought to enjoin the school district from preventing her participation in a school-sponsored student trip to Spain. While finding the school-sponsored trip to be an activity or program receiving federal financial assistance within the meaning of Section 504 of the Rehabilitation Act since regular salaried teachers would be acting as chaperones, the students would be under the supervision of school personnel, and the trip was scheduled while school was in session, the court found that plaintiff was not an "otherwise qualified" handicapped individual within the meaning of the Act. The court dismissed plaintiff's complaint, finding that she was unable to fulfill the physical requirements of the trip and that defendants' had demonstrated a substantial degree of physical risk to her safety. (The court did not, however, address the question of protections under the Education for All Handicapped Children Act.)

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* Concerning least restrictive environment.

D. WEALTH DISCRIMINATION

"Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers."

20 United States Code Sec. 1221-1 (Education Amendments of 1974).

"Denial of any right on the basis of wealth is always potentially invidious and must be examined carefully. In the case before us it is clear that to deprive poor children of access to education not only serves no legitimate state purpose by the analysis outlined above, but further actively defeats the equalizing principles which are the foundation of a public school system and in fact of democratic government. The failure of a child to obtain basic skills haunts him throughout life and hinders his ability to exercise the very rights of his citizenship."

In re Distribution of Educational Books and Materials to Underprivileged Students in West Virginia, No. MDL 280 (N.D. W.Va., June 17, 1977) (Clearinghouse No. 22,055H) ("needy" children must be supplied with textbooks, workbooks, and other educational materials and activities without cost).

Despite the Congressional statement of national policy above, there are no federal statutes and regulations concerning discrimination based on economic class analogous to Title VI concerning race, color, and national origin (see §III.A), Title IX concerning sex (see §III.B), or Section 504 concerning handicaps (see §III.C). This leaves state and federal constitutional provisions as the main avenues for pursuing legal challenges.

Similarly, the data base for looking at the impact of suspension, expulsion, and other school practices by student economic class is not as developed as for race, national origin, and sex. For instance, the survey forms collected by the Office for Civil Rights do not contain this information. (See table in appendix to §III.A.)

Nevertheless, it is clear that low-income students receive a disproportionate share of the total of school discipline. Some research has focused on the processes by which this occurs.

Mary R. Harvey, "Public School Treatment of Low-Income Children: Education for Passivity," 15 Urban Education 279 (1980) (students in low-income classrooms were criticized more frequently, subjected to more control, and treated with lower teacher expectations as to behavior and academic performance even though their actual classroom behavior, as rated independently, was not significantly different from other students;

Ray C. Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," 40 Harvard Ed. Review 411 (1970) (similar findings from study of within-classroom differences).

See also:

Samuel Bowles and Herbert Gintis, Schooling in Capitalist America: Educational Reform and the Contradictions of Economic Life, New York: Basic Books, Inc. (1976).

Federal Equal Protection Standards

Analysis of discrimination on the basis of economic class under the Equal Protection Clause is not as clear as equal protection analysis of race, sex or national origin discrimination, and cases have been fewer.

The issue of whether wealth is, like race or national origin, a "suspect classification," thereby making state action on the basis of such classification unconstitutional unless necessary to serve a compelling state interest which cannot be met through other means, was discussed but not fully decided in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), where the Court upheld the school finance system in Texas under which unequal expenditures resulted from variations in school districts' property wealth. The Court's finding that no suspect classification was involved was based on the conclusion that plaintiffs had simply failed to identify any relevant class or to prove that "poorer" people tended to live in "poorer" districts (and in fact there was evidence to the contrary). While the Court noted that in its previous wealth cases there traditionally had been some identifiable class of persons who because of poverty were "completely unable to pay for some desired benefit, and, as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit" (20), the Court did consider at least the possibility that a suspect class might be found if plaintiffs had been able to show either "discrimination against a class of definably 'poor' persons" (22-25) or "comparative discrimination based on family income" (25-27), instead of the amorphous class here of those who, regardless of personal wealth, happened to reside in low-wealth districts. (In any event, if wealth were found to be a suspect classification like race, it should not be necessary to demonstrate a total deprivation of education -- just as relative, significant deprivations of educational opportunity on the basis of race are suspect.)

Rodriguez may thus be distinguishable from other cases in which poor children bear the brunt of school practices on several grounds. First, the Rodriguez court's difficulty in finding an identifiable class of poor persons, since there was no proof that school districts which were low in property wealth were also the districts with most poor persons, should not be a problem in other kinds of cases. Second, the Rodriguez court found no proof that low district property wealth resulted in denial of any particular desired benefit, which will also not be a problem for other issues (such as disciplinary exclusion). Third, the Rodriguez court expressed reluctance to get the judiciary involved in re-ordering the state's entire school financing system, a prospect which is also not involved in other settings.

In Plyler v. Doe, _____ S. Ct. _____, 50 U.S.L.W. 4650 (1982), the Supreme Court struck down the state's policy of allowing the children of undocumented aliens to attend schools only upon payment of tuition as having no rational basis under the Equal Protection Clause. While finding that undocumented aliens "cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy,'" (4656), and while not discussing the issue of wealth classifications at all, the Court set out general criteria for determining the existence of a suspect classification (4656 n. 14):

> "Several formulations might explain our treatment of certain classifications as suspect. Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971); see United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protectin Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

One of the lower court decisions affirmed by the Court, Doe v. Plyler, 458 F. Supp. 569, 581-82 (E.D. Tex. 1978), aff'd, 628 F. 2d 448 (5th Cir. 1980), noted the possibility that the charges may have created a suspect wealth classification under Rodriguez, but found it unnecessary to decide the case on those grounds. The other decision affirmed by the Court (on other grounds), In re Alien Children Litigation, 501 F. Supp. 544, 570-72 (S.D. Tex. 1980), actually did find that the charges created a suspect wealth classification. Other lower court decisions recognizing that wealth classifications in education may be suspect under Rodriguez (at least in the case of absolute deprivation), include:

Kruse v. Campbell, 431 F. Supp. 180, 186-188 (E.D. Va. 1977) (partial reimbursement for cost of private education of handicapped children, which was helpful only to those parents who could afford to pay the remainder, illegal), vacated and remanded, 98 S.Ct. 38 (1977) (lower court instructed to decide case on the basis of the Rehabilitation Act rather than the Equal Protection Clause);

Shaffer v. Board of School Directors, 522 F. Supp. 1138, 1142-45 (W.D. Pa. 1981) (on appeal) (wealth discrimination in providing free transportation to kindergarten in only one direction);

In re Distribution, supra;

Colorado Association for Retarded Children v. Colorado, C.A. No. C-4620 (D. Colo., motion to dismiss denied, July 13, 1973) (differing education available to handicapped children on the basis of wealth).

Cf.: Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (a state "could not, for example, reduce expenditures for education by barring indigent children from its schools");

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969) (successful challenge to tracking system based on allegations of bias and overrepresentation of poor and black students in lower tracks).

Compare:

Lujan v. Colorado State Board of Education, ___ P. 2d ___ (Col. 5/24/82) (school finance system did not discriminate against a suspect class).

Just as with race classifications, if wealth is found to qualify as a suspect classification, actions which have different impact on students with different family incomes will be treated as suspect only if the discrimination is "intentional" under the standards in §III.A. Harris v. McRae, 100 2671, 2691-92 and n. 26 (1980).

Even if wealth is not treated as a suspect classification, school actions which treat students differently on the basis of economic class may in some cases be struck down on the grounds that they failto meet even the more restrained test of a "rational relationship to a legitimate purpose." See, for example, Doe v. Plyler, supra. For discussion of this standard, see §VI.C, "Equal Protection."

Some courts have indicated that, at least in certain circumstances, it may be proper to view wealth discrimination from an intermediate, or sliding scale, standard, rather than either "strict scrutiny" or the tradition version of "rational relationship." Under this approach, there is assessment of the relative importance of the interests affected, the nature of the class discriminated against, and the relative justification for the action, See, for example:

Shaffer, supra;

Board of Education, Levittown Union Free School District v. Nyquist, 408 N.Y.S. 2d 606, 636-38 (Sup. Ct., Nassau County 1978), aff'd as modified, 443 N.Y.S. 2d 843 (Sup. Ct., App. Div. 1981), rev'd, _____ N.Y.S. 2d ____ (Ct. App. 6/23/82) (school finance system ultimately upheld) (lower courts reviewed the application of this intermediate standard in other cases);

Alevy v. Downstate Medical Center, 384 N.Y.S. 2d 82 (1976).

In Plyler v. Doe, supra, the Supreme Court, while finding that the exclusion of the children of undocumented children lacked a rational basis, recognized that it was in fact applying an "intermediate" standard of scrutiny (4654 and n. 16), under which the challenged action will not "be considered rational unless it furthers some substantial goal of the state" (4656, 4657). The Court applied this higher, but not strict, scrutiny in part because of its recognition of the importance of the interest in education (see §VI.C for discussion) and in part because the action penalized children for a status over which they do not have control -- the undocumented alienage of their parents (see §VII.E, "Conditions Beyond the Student's Control"). Similarly, although not discussed by the Court, children have no control over the economic class of the family into which they are born, and the principles in Plyler may thus provide some basis for arguing that school decisions based on a student's economic class should have to meet this intermediate "substantial interest" test of rationality (especially since the family's economic class, unlike its undocumented alienage status, is "a constitutional irrelevancy" -- see above). See also Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

Courts have also struck down on due process grounds certain state actions which have the effect of barring poor persons from exercising their legal rights (and without reference to discriminatory intent). See:

Griffin v. Illinois, 351 U.S. 12 (1956) (law which required indigent criminal defendants to pay for transcripts for use on appeal had no rational relationship to guilt or innocence);

Boddie v. Connecticut, 401 U.S. 371 (1971) (filing fees for divorce created arbitrary exclusion from access to court system on basis of poverty);

Little v. Streater, 101 S. Ct. 2202 (1981) (statute requiring indigent to pay for blood grouping tests in paternity suit violates due process right to be heard);

Shaffer, supra, 522 F. Supp. at 1141-42.

State Constitutional Standards

Some courts treat provisions of their states' constitutions differently from the analogous provisions of the federal constitution. Thus, wealth has been declared a "suspect classification" under the equal protection clause of the state constitution in:

Serrano v. Priest, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P. 2d 929 (1976), cert. denied, 97 S.Ct. 2951 (1977) (school finance case);

Washakie County School District No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980)(same).

Cf. Discussion of other school finance cases treating education as a fundamental interest under the state constitution, in §VI.C, "Equal Protection."

Compare:

Hartzell v. Connell, No. 133394 (Cal. Super. Ct., Santa Barbara County, 3/30/81) (Clearinghouse No. 42,430) (no discrimination on basis of wealth where student activity fee for extracurricular activities was waived for students unable to afford it);

Lujan, *supra*.

IV. RIGHT TO PRIVACY

A. GENERAL

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R.Co. v. Botsford, 141 U.S. 250, 251 . . .(1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564. . . (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 . . . (1968), Katz v. United States, 389 U.S. 347, 350. . . (1967); Boyd v. United States, 116 U.S. 616. . .(1886), see Olmstead v. United States, 277 U.S. 438, 478 . . .1928)(Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485. . ., in the Ninth Amendment, id., at 486 . . .(Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 . . .(1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325 . . .(1937), are included in the guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 . . .(1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 . . . (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454. . .; id., at 460, 463-465 . . . (White, J., concurring in the result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 . . .(1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535. . . (1925), Meyer v. Nebraska, supra."

Roe v. Wade, 410 U.S. 113, 152-53 (1973)
(emphasis added).

"Students in school as well as students out of school are 'persons' under our Constitution." Tinker v. Des Moines Independent School District, 393 U.S. 503, 511 (1969). Thus, the rights of privacy described in Roe are guaranteed to students.

Merriken v. Cressman, 364 F.Supp. 913 (E.D.Pa. 1973);
White v. Davis, 13 C.3d 757 (Cal. 1975);
People v. Russell, 214 Cal.App.2d 445, 29 Cal.Rptr.562 (1963).

See:

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976)(blanket requirement that minors seeking abortion obtain parental consent is unconstitutional violation of privacy);
Carey v. Population Services International, 431 U.S. 678 (1977)(ban on distribution of contraceptives to those under 16 years of age is unconstitutional invasion of privacy).

Cf: Runyon v. McCrary, 96 S.Ct. 2536, 2598 (1976)(privacy interests implicated in the school as well as the home).

More, privacy rights deserve special attention in the school:

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. . . .

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

See also:

Shelton v. Tucker, 364 U.S. 479, 487 (1960).

As Sweezy indicates, privacy is particularly important in the schools because it is related to First Amendment freedoms of expression. Those freedoms are likely to be inhibited or chilled if subject to illegitimate disclosure or intrusion.

Shelton, supra;
Sweezy, supra;
Keyishian v. Board of Regents, 385 U.S. 589 (1967);
N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1958);
White, supra.

Education depends upon students' and teachers' being open to involvement in the learning process. This in turn requires risks which will not be taken unless those students and teachers feel that the school is a secure place which guarantees their privacy. Further, students at various periods in their often rapid personal development can only feel stunted and frustrated -- if not humiliated -- when information about their "former selves" is taken too seriously, is maintained permanently, or has been disclosed. See, e.g., Edgar Friedenberg, The Vanishing Adolescent, (1959). Finally, students in school may have particular claims to privacy protection because they are compelled to be present and are often compelled to participate in activities in which they must reveal aspects of themselves.

Recent Supreme Court cases provide some guidance for legal analysis of privacy rights. First, privacy rights are of at least two different types: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 97 S.Ct. 869, 876 (1977). Second, where the state places any significant burden on the fundamental rights protected by privacy, that burden must generally be justified by a compelling state interest, and the state's action "must be narrowly drawn to express only those interests." *Carey*, 97 S.Ct. at 2016.

For minors, however, there may be additional, permissible justifications: "State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest. . .that is not present in the case of an adult.'" *Id*. at 2020. Although this additional test is apparently less rigorous than the compelling interest test, the Court's careful scrutiny in rejecting the state's attempted justifications in *Carey* and *Planned Parenthood* demonstrate it is nevertheless an exacting one. Further, the "significant interest" test applies only to interests "not present in the case of an adult." Under this analysis, interests which could also be advanced concerning adults thus must meet the compelling interest test when applied to minors.

Finally, the privacy interests in *Carey* and *Planned Parenthood* were of the second type -- "the interest in independence in making certain kinds of important decisions" -- and the Court has stated that this interest depends in part on the capability for making such decisions, which relates to maturity. *Carey*, 97 S.Ct. at 2020 n.15. Where, on the other hand, the privacy interests at stake are mainly of the first type -- "the individual interest in avoiding disclosure of personal matters" -- there is arguably no relationship to maturity or age, and the compelling interest test should apply to minors. In any event, the analysis of any particular school situation under either test should take into account the important privacy interests in the schools, as described above.

In addition to the United States Constitution, privacy rights may be found in certain state constitutions and statutes and in a common law right of privacy, sometimes termed "the right to be let alone." Warren and Brandeis, "The Right to Privacy," 4 *Harv.L.Rev.* 193, 195 (1890). For recent application, see *Deaton v. Delta Democrat Publishing Co*., 326 So.2d 471 (Miss.Sup.Ct. 1976)(common law right applicable to invasion of privacy action for newspaper story with names and photographs of students in classroom for "retarded").

Two of the most extensive analyses of privacy interests in school are found in *White v. Davis*, *supra*, dealing with the use of undercover agents (see §IV.D); and *Merriken v. Cressman*, *supra*, dealing with collection of personal information about students and their families in order to identify "potential drug abusers" (see §IV.E.).

B. SEARCH AND SEIZURE

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> United States Constitution,
> Amendment IV.

General Supreme Court Doctrine -- Warrant Based on Probable Cause

The basic rule of the Fourth Amendment as applied to searches of citizens by government officials when investigating individual wrongdoing is that a search is unconstitutional unless a judge or magistrate has issued a warrant after being presented with sufficient evidence to establish probable cause that an illegal act has been committed. The warrant requirement serves several purposes: (1) providing neutral and detached review by a disinterested judicial officer not involved in investigation or prosecution before intruding on constitutionally protected privacy; (2) assuring the person being searched that he/she is not being subjected to unbridled, arbitrary action; and (3) preventing improper searches from being justified afterwards on the basis of evidence obtained from the illegal search. Searches without warrants "are held unlawful notwithstanding facts unquestionably showing probable cause."

Agnello v. United States, 269 U.S. 20, 33 (1925);
Katz v. United States, 389 U.S. 347, 356 (1967);
Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971);
United States v. United States District Court, 407 U.S. 297, 315-17 (1972);
G.M. Leasing Corp. v. United States, 97 S.Ct. 619, 631 (1977).

This general rule is "subject only to a few specifically established and well-delineated exceptions." Katz, 389 U.S. at 357. These exceptions (e.g., emergency, consent, etc.) are discussed below.

School Cases Ignoring the Basic Doctrine

The Supreme Court has never decided a case directly involving the application of the Fourth Amendment to students. There have been relatively few federal lower court decisions, and most opinions have been issued by state courts. The law is in a state of flux.

Unlike some of the earlier decisions, most cases now state or assume that students are protected by the Fourth Amendment in searches by school officials and law enforcement officers. Nevertheless, with a few recent exceptions, these cases have generally not applied the warrant and probable cause standards, despite the fact that most of the searches did not fit any of the "specifically established and well-delineated exceptions." The most common formulation in these cases is "reasonable suspicion" or "reasonable cause" to believe that the student possesses something illegal. It is not clear exactly what this standard means. One of the clearer definitions may, however, provide some guidance:

> Among the factors to be considered in determining the sufficiency to cause to search a student are the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search is directed, the exigency to make the search without delay and the probative value and reliability of the information used as a justification for the search. [In re John Doe VIII v. State, 88 N.M. 347, 540 P.2d 827 (Ct.App. 1975)]

The decisions which have departed from warrant and probable cause requirements are listed below and are also summarized, and in large measure criticized, by:

William G. Buss, "Search of Students by School Officials in Public Schools," 20 Inequality in Education 5 (1975) [reprinted in Center for Law and Education, The Constitutional Rights of Students, 127-34 (1976)];

Robert E. Phay and George T. Rogister, Jr., "Searches of Students and the Fourth Amendment," 5 Journal of Law and Education 57 (1976).

The general reason given for relaxing traditional Fourth Amendment standards is school officials' obligation to maintain a safe environment for the students in their charge (often described as "in loco parentis" responsibility). The standard applied by lower courts has varied depending upon (1) whether the search is of a student's locker or his/her person or dorm room (with the former often almost entirely unprotected); and (2) whether the search is conducted or instigated primarily by school officials seeking to maintain order in the school or by law enforcement officials seeking evidence of criminal activity (the latter tending to require warrant and probable cause). [One decision has placed a security officer employed by the school in the latter category and required probable cause. People v. Bowers, 72 Misc. 2d 800, 339 N.Y.S. 2d 783 (1973).] Yet, these distinctions do not seem entirely justified.

Courts exempting lockers from significant protection have relied on one or more theories. First, locker searches are sometimes treated as "administrative searches." However, the Supreme Court exception for "administrative searches" depends upon the search being "neither personal in nature nor aimed at the discovery of evidence of crime." *Camara v. Municipal Court*, 387 U.S. 523, 527 (1967) (routine annual inspection of all houses in a neighborhood in order to enforce housing code). Further, the Court held that even for searches meeting these terms the warrant and probable cause requirements generally still apply, although a modified standard of probable cause is required. *Id*. at 534-39.

See also:

Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978) (warrant required for safety searches of businesses by Occupational Safety and Health Administration);

Michigan v. Tyler, 98 S.Ct. 1942 (1978) (warrant required for fire officials investigating cause of fire).

Compare:

Donovan v. Dewey, 101 S.Ct. 2534 (1981) (a narrowly tailored system of regular warrantless administrative inspections of *commercial* property, e.g. for compliance with health and safety regulations, as distinguished from searches for contraband or evidence of crime, may be permissable under certain circumstances).

Second, it is sometimes claimed that students have waived their Fourth Amendment rights concerning lockers and/or that they have no reasonable expectation of privacy since they are aware that the school maintains control over lockers. However, as pointed out by Buss, *supra* at 8-9, and *Smyth v. Lubbers*, 398 F.Supp. 777, 788 (W.D.Mich. 1975), this approach begs the issue -- government benefits cannot be conditioned upon waiver of constitutional rights, and expectations of privacy are not "reasonable" if they have been lowered because the school has made it clear that it will not follow Fourth Amendment standards, so that in any case it is still necessary to determine whether the requirements of the Fourth Amendment have been met. See also *Jones v. Latexo Independent School District*, 499 F.Supp. 223, 234 (E.D.Tex. 1980).

Third, courts have sometimes relied upon a claim that the lockers are the property of the school and not the student. The Supreme Court has declared, however, that "the Fourth Amendment protects people, not places," thus covering a phone conversation in a telephone booth.

Katz, 389 U.S. at 351.

See: *U.S. v. Chadwick*, 433 U.S. 1 (1977) (locked footlocker protected), where the court reiterated the language in *Katz* and emphasized that the Fourth Amendment is by no means restricted to protection of one's home;

Stoner v. California, 376 U.S. 253 (1960) (taxicab);

Marshall v. Barlow's Inc., *supra* (business);

U.S. v. Blok, 188 F.2d 1019 (D.C.Cir. 1951) (desk).

Compare:

New York v. Belton, 101 S.Ct. 2860 (1981):
United States v. Ross, ___ S.Ct. ___. 50 U.S.L.W. 4580 (6/1/82)
(automobile exception includes closed containers within the automobile)

The school official/police distinction is likewise open to question. First it is often based upon the view that school-initiated searches are "administrative." As noted above, however, they are not. Second, the line between searches for the purpose of maintaining school order and searches for law enforcement purposes is often impossible to draw, even though the police did not initiate the search. School officials may often, along with their institutional motivation, also have the intention of turning over any seized evidence to the police. At any rate, where such evidence is found, it is likely to result in criminal prosecution regardless of the school's initial motive. See Buss at 7. Third, such a distinction creates a temptation to conceal school-police cooperation and to pressure school officials to carry out the police's functions in order to avoid warrant requirements. Id. at 7-8. Fourth, the distinction makes particularly little sense where the student is subjected to school punishments with consequences as grave or graver than the applicable criminal sanction. Smyth, 398 F.Supp. at 787-88. Finally, the Supreme Court has made it clear that the warrant requirement does not depend upon whether or not the governmental purpose served by the search is criminal prosecution, for the intrusion upon privacy remains.

United States District Court, 407 U.S. at 318-320 (surveillance for the purpose of ongoing national intelligence gathering);
Camara, 387 U.S. at 530 (enforcing city's health and safety standards);
See v. City of Seattle, 387 U.S. 541 (1967) (routine search for enforcing city's fire code);
Marshall v. Barlow's, Inc., supra;
Michigan v. Tyler, supra;
See Morale v. Grigel, 422 F.Supp. 988, 996-97 (D.N.H. 1976) (search of student's room for missing stereo).

More generally, the attempt to avoid warrant requirements by citing the special considerations involved in maintaining a safe environment for students seems misdirected. The fact that governmental interests justify a search does not dispense with the need for a warrant. Warrantless searches are justified only where, in addition, the governmental interests are likely to be frustrated by a warrant requirement. This has been stated emphatically by the Supreme Court, even when presented with a need for the search based upon national security interests.

United States District Court, 407 U.S. at 315-16, 320.
See also:
Camara, 387 U.S. at 533;
G.M. Leasing Corp., 97 S.Ct. at 631;
Marshall v. Barlow's Inc., supra, (health and safety inspections still required warrant);
Michigan v. Tyler, supra, (investigation of cause of fire).

There is an exception discussed below under emergencies, for those situations in which a warrant would result in the kind of delay which would frustrate the legitimate interest in the search. Thus, the warrant requirement for school searches does not frustrate that interest any more than the general warrant requirement applied to citizens outside the school. See Smyth, 398 F.Supp. at 789, 792-93. Nor are school searches of the sort where the purposes usually served by the warrant (as noted in the first paragraph of the comments) are irrelevant or are being served in some other manner. See United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3086 (1976). Thus school searches should be governed by normal warrant requirements.

These standards for determining whether a warrant is necessary have thus been confused by lower courts with the standards for determining the level of probable cause which must be shown in order to obtain the warrant. The standard of probable cause which must be presented to the judge or magistrate is determined by "balancing the need to search against the invasion which the search entails." Camara, 387 U.S. at 537. It is at this point that the special considerations raised by school officials might be relevant. Instead, the courts have improperly applied this balancing test in order to dispense with the warrant requirement altogether.

Buss, at 11, 13, notes that the failure of most schools and courts to apply these Fourth Amendment standards faithfully to students stems in part from a disregard of the very real privacy interests of students:

> Yet the student in public school has a strong interest in privacy. In large measure the student shares with people generally a fundamental interest in being secure from offensive or harmful invasions of his/her private life and physical security. But this interest is also uniquely strong because personal freedom and privacy of students in public school are already restricted by compulsory attendance laws and the resulting structure and regulation of in-school life. Similarly, apart from the integrity of the student's own body, the school locker is one of the student's few harbors of privacy within the school. It is the only place where a student may be able to store what he or she seeks to preserve as private -- letters from a girl friend or

> or boy friend, applications for a job, poetry being written, books that may be ridiculed because they are too simple or too advanced, or dancing shoes the student may be embarrassed to own.
>
> * * * *
>
> . . .it is utterly misleading to contrast the student guilty of crime or serious misbehavior and all "other" students. All students have a stake in preserving a modicum of privacy against interference by the police, teachers, administrators, and other students. The student prosecuted is not the only student searched. Searches are conducted on the basis of suspicion, and plainly not all suspicions turn out to have been correct or to produce convictions. As the barriers against unreasonable searches go down, the privacy of all students is sacrificed. . . .Possibly of even greater significance, searches outside the usual Fourth Amendment bounds may directly affect all students, who learn the lesson that lofty principles may be converted into mere rhetoric when those with power find it expedient to do so.

List of Cases Decided Against Student

Cases which have gone against the student by ignoring the requirement of a warrant based upon probable cause, instead using one of the questionable rationales above, include:

Zamora v. Pomeroy, 639 F.2d 662, 670-71 (10th Cir. 1981) (search of student's locker following alert by sniffer dog met reasonable cause standard because school had joint control over locker);

Moore v. Student Affairs Committee, 284 F.Supp. 725 (M.D. Ala. 1968) (dormitory search by school officials requires only "reasonable cause" even when searching solely for violations of law);

M. v. Board of Education, 429 F.Supp. 288 (S.D.Ill. 1977) (search based on information from another student met "reasonable cause" standard where no police involvement and plaintiff was required "merely to empty his pockets");

Bilbrey v. Brown, 481 F.Supp. 26 (D.Ore. 1979) (warrant not needed where search based on probable cause and related to school's pursuit of order, discipline, safety and education);

In re W., 29 Cal.App.3d 777, 105 Cal.Rptr. 775 (1973) (search by school official need only be "reasonable" and within the scope of his/her duties);

In re C., 26 Cal.App.3d 320, 102 Cal.Rptr. 682 (police officer was merely acting as "agent" of school officials, who were themselves acting in "private" capacity);

In re G., 11 Cal.App.3d 1193, 90 Cal.Rptr. 361 (1970) (warrant or arrest procedures would have adverse effect on student and school);

In re Donaldson, 269 Cal.App.2d 509, 75 Cal.Rptr. 220 (1969) (search by vice principal not government action);

State v. Baccino, 282 A.2d 869 (Del.Super. 1971) (reasonable suspicion);

Nelson v. State, 319 So.2d 154 (Fla.App. 1975) ("reasonable suspicion" where students found smoking in restricted area with odor of marijuana present);

State v. Young, 234 Ga. 488 (1975) (Fourth Amendment protection for student searches by school officials minimal and the exclusionary rule does not apply if there is no police involvement);

In re J.A., 406 N.E.2d 958 (Ill.App. 1978) ("reasonable suspicion");

State v. Stein, 456 P.2d 1 (Kan. 1969), cert. denied, 397 U.S. 947 (1970) (police had "consent" of administrator and/or student);

In re G.C., 121 N.J.Super. 108, 296 A.2d 102 (1972) (drug search met by reasonable suspicion standard);

In re John Doe VIII v. State, 540 P.2d 827 (N.M.App. 1975) (search of student observed by teacher smoking pipe in violation of school rules upheld on "reasonable cause" standard);

People v. Jackson, 65 Misc.2d 909, 319 N.E.2d 731 (App.Term 1971), aff'd, 30 N.Y.2d, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972) (police found to be involved in chase but not in search; reasonable suspicion standard);

People v. Singletary, 333 N.E.2d 369 (N.Y. 1975) (upholding search based on precise information from student informant with history of reliability; People v. D., infra, distinguished).

Cf.: Commonwealth v. Dingfelt, 227 Pa.Super. 380, 323 A.2d 145 (1974) (search held reasonable; no "government" action);

Mercer v. State, 450 S.W.2d 715 (Tex.Civ.App. 1970) (search by principal not government action, in loco parentis);

People v. Boykin, 39 Ill.2d 617, 237 N.E.2d 460 (1968) (police search of student for gun in school based on anonymous information received by assistant principal upheld given that informant had nothing to gain by giving false information, although court seemed to apply same standards as for non-school searches).

Cases Decided for Students Without Applying Warrant/Probable Cause Requirements

Some cases have been favorable to students, while not applying (or in some cases reaching) warrant and probable cause requirements:

Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971) (dorm search held unreasonable, attendance could not be conditioned upon waiver of Fourth Amendment rights);

Gillard v. Schmidt, 579 F.2d 825 (1st Cir. 1978) (teacher case, reasonable expectation of privacy in his school desk, despite system's ownership of desk; superintendent liable for search for satirical cartoon);

Horton v. Goose Creek Independent School District, ___ F.2d ___, 50 U.S.L.W. 2751 (5th Cir. 6/1/82) (sniffer dog search of students without individualized suspicion held unreasonable, sniffer search of lockers and cars found reasonable);

Picha v. Wielgos, 410 F.Supp. 1214 (N.D.Ill. 1976) (where police and school officials work together on search which may result in criminal prosecution, school officials are subject to at least a reasonablenesss standard, and where police had own ends and were not called in merely to further the school's ends, they were subject to probable cause standard; issue of higher standards not reached);

Bellnier v. Lund, 438 F.Supp. 47 (N.D.N.Y. 1977) (unreasonable to strip search entire fifth grade class in attempt to find student who allegedly stole three dollars);

Doe v. Renfrow, 475 F.Supp. 1012 (N.D.Ind. 1979) (school strip search requires reasonable cause to believe student possessed contraband; alert by trained sniffer dog not sufficient; use of the dog itself did not constitute a search, however, and alert by dog did establish enough reasonable cause to justify emptying of pockets), rev'd in part, 631 F.2d 91, reh. and reh. en banc denied, 635 F.2d 582 (7th Cir. 1980) (reversed because lower court should have awarded damages; "the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law'"); cert. denied, 101 S.Ct. 3015 (1981);

M.M. v. Anker, 477 F.Supp. 837 (E.D.N.Y.), aff'd, 607 F.2d 588 (2nd Cir. 1979) (teacher's initial search of student's handbag, although requiring only "reasonable grounds to suspect" unlawful possession, was invalid where there was not more than suspicion that student "might" have stolen object; strip search required, and here lacked, probable cause);

State v. Trippe, 246 S.E.2d 122 (Ga.App. 1978) (school's chief security officer, who had also been deputized by county but who conducted search solely at request of school's dean, was treated by court as law enforcement official, thereby requiring exclusion of evidence from prosecution; State v. Young, supra, distinguished);

Jones v. Latexo Independent School District, supra, 499 F.Supp. at 231-37 (sniffer dog search of all students and of students' automobiles was an unconstitutional blanket search lacking in sufficient individualized suspicion, and the subsequent physical individual searches of plaintiffs and their automobiles, based on the dog's alert, were therefore also illegal);

People v. D., 34 N.Y.S.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974) (search by school officials was not justified by "unusual behavior in student's entering bathroom twice with other students or by information from "confidential sources" concerning student's possible drug-dealing; relies on Camara to establish a somewhat lower standard than usual probable cause; no discussion of warrant requirement);

People v. Bowers, 72 Misc.2d 800, 339 N.Y.S.2d 783 (Crim.Ct. 1973) (security guard treated as law enforcement official rather than school official, thereby requiring probable cause);

State v. Walker, 528 P.2d 113 (Oreg.App.Ct. 1974) (Fourth Amendment applies to searches by school officials; remanded to trial court to determine whether probable cause or some lesser standard should be used);

Cf.: Potts v. Wright, 357 F.Supp. 215 (E.D.Pa. 1973) (student right to sue school officials for unreasonable searches);

People v. Boykin, supra.

Cases Applying Warrant/Probably Cause Requirements

There have been a few decisions which have not fallen prey to the above confusion and have applied the appropriate warrant and probable cause requirements:

Caldwell v. Cannady, 340 F.Supp. 835, 839 (N.D.Tex. 1972) (school board use of evidence obtained by warrantless police search of automobile barred by principle that, absent a few narrow exceptions, warrantless searches are per se unreasonable);

Smyth v. Lubbers, supra, 398 F.Supp. at 791-93 (warrant and probable cause standards applied to search of college dormitory room);

Morale v. Grigel, supra, 422 F. Supp. at 998 (marijuana was illegally seized from dormitory room because school's search for stolen property was not conducted pursuant to a properly issued search warrant);

State v. Mora, 307 So.2d 317 (La.Sup.Ct. 1975) ("search on school grounds of a student's personal effects by a school official who suspects the presence or possession of some unlawful substance is not a 'specifically established and well delineated' exception to the warrant requirement"), vacated and remanded, 96 S.Ct. 20 (1975) (for the state court to consider whether its judgment was based upon the state constitution, the federal constitution, or both), decision on remand, 330 So.2d 920 (1975) (search was illegal under both state and federal constitutions), cert. denied, 97 S.Ct. 538 (1976).

See: Waters v. U.S., 311 A.2d 835 (D.C.Ct.App. 1973) (police officer summoned by school official had no probable cause to arrest and therefore no basis for a search incident to arrest, where officer observed envelopes similar to those used in previous drug transactions, a good deal of money, and the approach to the student by a known addict; exclusionary rule applied; if a lesser standard exists, it applies only to searches by teachers or administrators).

Cf.: In the Interest of L.L., 280 N.W.2d 343, 351-52 (Wis. App. 1979) (while court upheld warrantless search by teacher for suspected weapon under a specific "reasonable suspicion" standard, it also stated that this standard does not apply when there is adequate time to contact police and obtain a warrant; in such cases, a warrant must be obtained).

See also :

South Carolina Department of Education, Student Rights, Responsibilities and Resources in South Carolina (1975) (stating general rule of warrant requirement for search of student or his/her property, with exceptions during arrests and emergencies).

Consent Searches

Voluntary consent to a search is one of the recognized exceptions to the warrant requirement. As Buss, supra at 9 notes, however,

> "It would seem that there should be a strong presumption against the voluntariness of consent by young children. The courts have been extremely reluctant to infer a consent to a search that would otherwise be unreasonable under the Fourth Amendment. See Piazzola v. Watkins, 442 F.2d 284, 289 & n. 3 (5th Cir. 1971); Commonwealth v. McCloskey, 217 Pa.Super. 432, 435-36 & nn. 2-3, 272 A.2d 271, 273 & n. 2-3 (1970) and cases cited therein. The Supreme Court has noted the inherent unreliability of confessions and admissions by children, In re Gault, 387 U.S. 1, 45-48, 52 (1967); Gallegos v. Colorado, 370 U.S. 49, 53-54 (1962); and has emphasized the need for extreme care in determining of a waiver of both the right to remain silent and the right to counsel, In re Gault, supra, at 41-42, 55. Although the Supreme Court has rejected the argument that Miranda-type warnings are a condition precedent to the voluntariness of a search, Schneckloth v. Bustamonte, 412 U.S. 218, 232-34 (1973), the Court has stated that the failure to advise a person of his right not to consent was a relevant factor to be considered on the issue of voluntariness. Id. at 248-49. The student's freedom of action is severely limited by the laws and regulations that require attendance at a particular school and presence in a particular classroom or some other assigned location. During the entire school day the student's every movement is subject to control. Where "freedom of action is curtailed," the Supreme Court has observed, there are "inherently compelling pressures" that tend to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

Further, the Supreme Court has noted that consent must be distinguished from mere "acquiescence to a claim of lawful authority." *Bumpers v. North Carolina*, 391 U.S. 543, 548-49 (1968). Thus, while advising the student of his/her right not to consent may not always be essential to avoid a finding of coercion, the absence of such a warning in the school context -- where students assume that they must obey all "requests" upon penalty of being found "insubordinate" -- should certainly raise questions about whether there was voluntary consent. See:

Stroeber v. Commission Veteran's Auditorium, 453 F.Supp. 926, 933 (S.D.Ia. 1977) (court rejects notion that rock concert patrons "consented" to random warrantless search for drugs as a condition to gaining entrance);
Jones v. Latexo Independent School District, *supra*, 499 F.Supp. at 237 (school context in which students were accustomed to having to obey instructions and in which insubordination is a disciplinary offense establishes the absence of voluntary consent).

But cf.:
State v. Feazell, 360 So.2d 907 (La.App. 1978).

Emergency Searches

An exception to the warrant requirement exists where there is probable cause and genuine emergency conditions exist -- either "exigent circumstances" or "hot pursuit" -- which makes it impossible or unduly dangerous to take the time to obtain a warrant. For the analogous exceptions in non-school contexts, see:

Carroll v. United States, 267 U.S. 132, 159-62 (1925);
Schmerber v. California, 384 U.S. 757, 770-71 (1966);
Warden v. Hayden, 387 U.S. 294, 298-300 (1967);
Vale v. Louisiana, 299 U.S. 30, 34-35 (1970);
United States v. Santana, 96 S.Ct. 2406, 2409 (1976);
Michigan v. Tyler, 98 S.Ct. 1942 (1978).
Cf.: *In the Interest of L.L.*, *supra*.

Searches Incident to Lawful Arrest

A warrant is not necessary in order to search someone at the time they are lawfully arrested, provided that the search is limited to the person and the areas within his/her immediate physical control.

Chimel v. California, 395 U.S. 752 (1969);
Robinson v. United States, 414 U.S. 218 (1973);
Gustafson v. Florida, 414 U.S. 260 (1973);
New York v. Belton, 101 S.Ct. 2860 (1981);
Washington v. Chrisman, 102 S.Ct. 812 (1982).

Compare:
United States v. Chadwick, 433 U.S. 1, 14-15 (1977) (no justification for warrantless search of footlocker some time after lawful arrest, since police could keep it in custody while seeking search warrant);
Sibron v. New York, 392 U.S. 40 (1968) (search incident to arrest is unconstitutional if arrest was made without probable cause).

Cf.: Waters v. U.S., supra;
People v. Boykin, supra.

Stop and Frisk

Even where there is no probable cause to arrest, if facts give a police officer a reasonable basis to believe that criminal activity is afoot and that s/he may be dealing with an armed and dangerous person, s/he may in appropriate circumstances briefly detain the person and conduct a limited pat-down of the person's outer clothing, restricted solely for purposes of discovering weapons.

Terry v. Ohio, 392 U.S. 1 (1968);
See: Adams v. Williams, 407 U.S. 142 (1972);
United States v. Cortez, 101 S.Ct. 690 (1981).
Contrast:
Reid v. Georgia, 100 S.Ct. 2752 (1980) (stop must be based on a "reasonable and articulable suspicion;" fact that person fit a "drugs courier profile" of suspicious airport behavior was not enough);
Stroeber v. Commissioner Veteran's Auditorium, supra, 453 F.Supp. at 932 (stop-and-frisk exception cannot be applied to random searches at rock concert since reasonable suspicion standard must apply to particular individual).
Compare:
W.J.S. v. State, 409 So.2d 1209 (Fla.App. 1982);
In re Ronald B., 401 N.Y.S.2d 544 (Sup.Ct., App.Div., 1978).

Other Exceptions to Warrant Requirement

Other exceptions of less relevance to the school context have been made for certain types of searches involving automobiles, military installations, and national borders.

Specificity Required -- Prohibition of Blanket Searches

The Fourth Amendment itself requires "particularly describing the place to be searched, and the persons or things to be seized." This was central to the purposes of enacting the Fourth Amendment -- eliminating previous abuses involving general searches and the seizure of one thing under a warrant describing another. See:

Marron v. United States, 275 U.S. 192, 196 (1927);
Stanford v. Texas, 379 U.S. 476, 485 (1965);
Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971);
Andreson v. Maryland, 96 S.Ct. 2737, 2748 (1976).

Thus, as a general rule, blanket searches of entire classes or schools are illegal. See:

Piazzola v. Watkins, supra;
Bellnier v. Lund, supra;
Stroeber v. Commission Veteran's Auditorium, supra;
Jones v. Latexo Independent School District, supra.
Cf.: Horton v. Goose Creek Independent School District, supra.

While courts might well recognize exceptions in genuine general emergencies, such as a bomb scare, this would not permit a general search when, for example, something has been stolen but there is not sufficient probable cause (or reasonable cause) concerning any single student. Bellnier, supra.

Note that even a general inspection of lockers for cleanliness or missing library books would appear to require a warrant under the reasoning of Camara v. Municipal Court, 387 U.S. 523 (1967), as discussed above concerning "administrative" searches. The school might be able to avoid this requirement, however, with adequate prior notice of the inspection.

Sniffer Dogs, Metal Detectors, Etc.

The increasingly common practice of having a sniffer dog roam through classrooms in search of drugs would seem to violate the prohibition against general searches. In Doe v. Renfrow, supra, the court bypassed this requirement through the questionable judgment that the use of the dog did not constitute a search and that no search was involved until after specific students had been identified. Cf. Zamora v. Pomeroy, supra (court ignored the issue of whether having sniffer dog walk past lockers constituted a search, holding that opening up the locker to which dog alerted was based on sufficient cause in light of school's joint control over the locker).

This reasoning ignores the impact on the school atmosphere, and on the extent to which the school is percieved as a place for open inquiry, of such police-style tactics. See White v. Davis, 13 Cal. 3d 757, 120 Cal.Rptr. 94, 533 P.2d 222 (1975); and other cases discussed in §IV.D, "Surveillance, Etc."

The reasoning of Doe was specifically rejected in Jones v. Latexo Independent School District, supra, 499 F.Supp. at 231-37, where the court found that use of a sniffer dog did constitute an unreasonable, blanket search. The court noted that the dog, by perceiving things which are undetectable by human senses, was much more like an electronic "bug," which does constitute a search, than like a flashlight. See also the dissent from the denial of rehearing en banc in Doe, in which Judge Swygert describes the details of the mass sniffer dog search. 635 F.2d at 582-84. [In Horton v. Goose Creek Independent School District, supra, the Fifth Circuit rejected the Doe approach, found that the use of sniffer dogs is a search, and held, as in Jones, that their use on students without individualized suspicion was an unreasonable blanket search, but found, unlike Jones, that their use on cars (and lockers), since less intrusive, was a reasonable "administrative" search. But see Camara and discussion of administrative searches, supra.]

Finally, Justice Brennan (dissenting from denial of certiorari in Doe, 101 S.Ct. 3016, 3019), after describing the intrusiveness of the search, concluded:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

Strip Searches

It is generally recognized that searches in which students are forced to remove their clothes are among the most intrusive, requiring relatively strong justification. Particular strip searches have been invalidated in:

Bellnier v. Lund, *supra*;
Doe v. Renfrow, *supra*;
M.M. v. Anker, *supra*;
People v. D., *supra*.

Exclusion of Evidence from Improper Search

Once it is established that a search was illegal, the question arises as to whether evidence obtained from the search must be excluded from any disciplinary hearing. This is addressed in §XI.F.8.c, "Exclusion of Improperly Acquired Evidence."

C. POLICE IN THE SCHOOLS

Police Authority to Enter School

It is generally assumed that a school has legal authority to invite the police into the building, but this authority is not unlimited. Based upon a reading of state law in a particular jurisdiction, school authorities may well be acting ultra vires (beyond their legal power) if they invite the police into the school when not related either to carrying out the school's specific statutory duties or to their implied power to maintain an orderly school system. These principles are extended in the discussion below of the circumstances under which students or school facilities may be turned over to the police for interrogation purposes. See also §V.A on ultra vires.

Limits on the presence of police in the school can also be seen in Constitutional terms. A brief look at some of the Supreme Court quotes found throughout this manual (see especially §I.B.1, "Speech," §I.B.6, "Association," and §IV, "Privacy") should make it clear that the vigorous forms of free inquiry and association contemplated and encouraged by the Constitution are incompatible with a police atmosphere within the school. See also White v. Davis, 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222 (Cal.Sup.Ct. 1975) and other cases quoted under §IV.D, "Surveillance and Investigation," concerning the presence of undercover police.

Police Interrogations

(a) School Authority to Turn Student Over to Police for Questioning

The Oakland Lawyers Committee has argued that, under California state law, there are limitations on the school's authority to place a student at the police's disposal for questioning:

> To summarize to this point, it may be said that (1) at least in the absence of express parental consent, school district personnel are not authorized by the Education Code to take any action whatsoever to place a pupil at the disposal of the Oakland Police Department for questioning about events unrelated to his school attendance, (2) pupil absences from class for purposes of police questioning, etc., are non-qualifying for purposes of computing Average Daily Attendance [for receiving state aid], and (3) if such police questioning, etc. falls within the term "matters of public interest" as used in Education Code Section 16551, the governing board may permit use of school buildings and grounds for such

> a purpose, but only if such use does not interfere with the use of buildings or grounds for "school" purposes and only if such use does not interfere with the "regular conduct of school work."

Oakland Lawyers Committee, letter to Dr. Marcus Foster, p. 11 (October 28, 1970). Copies of both this letter and the September 23, 1969, memorandum (discussed below) are available from the Center for Law and Education.

Similarly, the New York State Education Department has indicated that the *ultra vires* issues concerning police presence apply in particular to police interviews of students:

> . . .The question here involved then is whether the board can permit its facilities and property to be used by someone else to perform the services which it itself legally may not do.
>
> Under the provisions of the Compulsory Attendance Law we have always held that children are given over to the custody of the school authorities for one purpose only and that is education in all its phases, and that under the terms of that statute boards of education do not have the legal right to impose obligations or even make available to children, irrespective of their value, facilities which the board is not specifically authorized so to do. As an illustration, we hold that the police authorities have no power to interview children in the school building or to use the school facilities in connection with the police department work, and the board has no right to make children available for such purpose. The police authorities must take the matter up directly with the parents. Of course, if a warrant were issued for the arrest of a child or a crime was committed on school property or an order and summons was issued by the Children's Court, the situation would be different.
>
> . . .If it performs *ultra vires* acts the question of legal responsibility should there be any negligence involved would arise. The expenditure of money for the use of its facilities, viz., light, heat, room space, repairs etc. is another aspect. . . .[1 Ed. Dept.Rptr. 766 (Formal Opinion of Counsel, March 7, 1952.)]

Hawaii Family Court Judge S. George Fukuoka has written,

> Mindful of the need for effective law enforcement, I nevertheless offer the suggestions that the questioning

> of students on school premises during school hours for whatever purpose be confined to situations where conditions and circumstances patently preclude the exercise of other alternatives. [Letter to Maui County Chief of Police, August 1, 1972.]

The Hawaii State Board of Education subsequently adopted a rule which prohibits police interviews of students in the school for non-school related offenses without prior parental consent and notification to the parent that he/she may be present at the interview. When a student is arrested at school, school officials are required to attempt to inform the parents. "Rule 3. Relating to Police Interviews and/or Arrest of Students During School Hours" (4/14/77)(Clearinghouse #22,304C).

(b) Student's Rights When Being Questioned

The leading case concerning police interrogations, which discusses various aspects in great detail, is Miranda v. Arizona, 384 U.S. 436 (1966). In a custodial interrogation, the person must be informed of his/her right to remain silent, that anything he/she says may be used as evidence against him/her, and of his/her right to the presence of an attorney. While notice of these rights is generally required only for custodial interrogations -- those where the person has been taken into custody or deprived of his/her freedom of action in any significant way, 384 U.S. at 444 -- the rights themselves to remain silent (and thus to refuse to answer questions until an attorney is present), to become silent even if one has answered previous questions, and to be free from coercion apply to any interrogation. (Further, it might be argued that a police interrogation in school is by its very nature custodial, given the compulsory nature of school attendance and the fact the student is already under the custody of school officials.) On the definition of custodial "interrogation," and its application to any police words or actions which the police "should know are reasonably likely to elicit an incriminating response from the suspect," see Rhode Island v. Innis, 100 S.Ct. 1682 (1980).

There is also legal support for requiring that the parent be present wherever possible. As the Oakland Lawyers Committee has noted, this is because a student, as a minor, may not be legally competent to waive his/her right to remain silent:

> When a police officer asks a question of an adult and receives an answer, it is assumed that any right not to answer the question is waived. It is often necessary for the police officer to warn the person that he need not answer. Even then, the person may waive his right not to answer.
>
> When a school-child is involved, several new factors are introduced, viz., greater

> susceptibility to intimidation by "authority," ignorance of the long-range implications, and emotional immaturity. Thus, when a child answers police questions, we cannot so readily say that he has "waived" his right *not* to answer. It is the premise of the Lawyers Committee, based upon implications in recent court decisions, that a child's disabilities include the incapacity to make the equivalent of an adult decision to answer or not to answer police questions. A child needs adult help in such a situation and, although some may imagine that the school staff can and will assume this responsibility, the Lawyers Committee believes this to be unrealistic.
>
> Accordingly, the Lawyers Committee has suggested that, except in cases in which a delay would *significantly* affect the investigation or might increase an existing risk of bodily harm to any person, no student should be subjected to any police questioning until the student's parent is contacted, etc. The Committee recognizes that in some situations the necessity to contact parents prior to questioning would be quite burdensome. The Committee, nevertheless, believes that if its procedure is faulty, it should fail in the direction of safeguarding the fundamental constitutional rights of students.
>
> The term "might increase an existing danger of bodily harm to any person," is intended to allow for cases such as missing children where foul play may be involved, severe illness which may be due to consumption of an unidentified drug, etc. [Memorandum to Board of Education of Oakland Unified School District, September 23, 1969.]

The leading cases cited by the Lawyers Committee (in the subsequent letter to Marcus Foster, above) in support of its proposal were *Harling v. United States*, 295 F.2d 161, 163-64, 163 n.12 (D.C.Cir. 1961); *People v. Lara*, 67 Cal.2d 365, 62 Cal.Rptr. 586, 432 P.2d 202 (1967). Juveniles' rights against self-incrimination are also set out at length in *In re Gault*, 387 U.S. 1, 42-56 (1967). See especially 387 U.S. at 55:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect

> to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique -- but not in principle -- depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissable reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

More generally, for both children and adults, "courts indulge in every reasonable presumption against waiver," and it is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" Brewer v. Williams, 97 S.Ct. 1232, 1242 (1977). See also:

Little v. Arkansas, 98 S. Ct. 1590 (1978) (Marshall, J., disserting from denial of certiorari);
Riley v. Illinois, 98 S. Ct. 1657 (1978) (same);
Institute of Judicial Admin./American Bar Ass'n, Joint Commission on Juvenile Justice Standards, Standards Relating to Police Handling of Juvenile Problems (1978).

D. SURVEILLANCE AND INVESTIGATION

"Do the state and federal Constitutions permit police officers, posing as students, to enroll in a major university and engage in the covert practice of recording class discussions, compiling police dossiers and filing 'intelligence' reports, so that the police have 'records' on the professors and students? [13 Cal. 3d at 760]

". . .it is by now black letter First Amendment law that government activity which even indirectly inhibits the exercise of protected activity may run afoul of First Amendment proscriptions. Given the delicate nature of academic freedom, we visualize a substantial probability that this alleged covert police surveillance will chill the exercise of First Amendment rights. [761]

"In light of this potentially grave threat to freedom of expression, constitutional authorities establish that the government bears the responsibility of demonstrating a compelling state interest which justifies such impingement and of showing that its purposes cannot be achieved by less restrictive means. [id.]

"Moreover, the surveillance alleged in the complaint also constitutes a prima facie violation of the explicit 'right of privacy' recently added to our state Constitution. As we point out, a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government's increasing collection and retention of data relating to all facets of an individual's life. . . .Though the amendment does not purport to invalidate all such information gathering, it does require that the government establish a compelling justification for such conduct. [id.]

". . .In a line of cases stretching over the past two decades, the United States Supreme Court has repeatedly recognized that to compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of First Amendment rights. . . .N.A.A.C.P. v. Alabama, 357 U.S. 449, 462. . . .Talley v. California (1960) 362 U.S. 60,64. . . .See also Lamont v. Postmaster General (1965) 381 U.S. 301, 307. . . .[Quotations omitted] [768]

"The threat to First Amendment freedoms posed by any covert intelligence gathering network is considerably exacerbated when, as in the instant case, the police surveillance activities focus upon university classrooms and the environs. . . .Shelton v. Tucker (1960) 364 U.S. 479, 487. . . .Keyishian v. Board of Regents (1967) 385 U.S. 589, 603. . . . [Quotations omitted] [768-69]

"In other contexts, a number of courts have issued injunctions against continued police surveillance in cases in which such conduct imposed a similar chilling effect on First Amendment rights. . . .Local 309 v. Gates (N.D. Ind. 1948) 75 F.Supp. 620 [strike activity]. . . .Bee See Books Inc. v. Leary (S.D.N.Y. 1968) 291 F.Supp. 622 [adult bookstores]. . . .[771]

"The motto of one of our great universities -- Stanford University -- is 'The wind of freedom blows,' but the air of its classrooms would be befouled indeed by the presence of secret police. In the course of classroom debate some thoughts will be hazarded only as the trial balloons of new theories. Yet such propositions, that are tentative only, will nevertheless be recorded by police officers, filtered through the minds of the listening informers, often incorrectly misstated to their superiors and sometimes maliciously distended. Only a brave soul would dare to express anything other than orthodoxy under such circumstances. But the classroom of the university should be a forum of free expression; its very function would largely be destroyed by the practices described in the complaint before us." [777]

White v. Davis, 13 Cal. 3d 757, 120
Cal. Rptr. 94, 533 P.2d 222 (Cal.
Sup. Ct. 1975)(reversing Superior
Court dismissal).

"These pages need not be burdened with proof. . .of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through actions that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . .In these matters of the spirit inroads on legitimacy must be resisted at their incipiency."

Sweezy v. New Hampshire, 354 U.S. 234,
262-63 (1957) (J. Frankfurter concurring).

"Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech."

United States v. United States District
Court, 407 U.S. 297, 320 (1972).

The court in White v. Davis also refuted defendants' contention that the "semi-public" nature of the classroom destroys any claim to privacy or protection against chilling effects from surveillance. 13 Cal.3d at 768n.4.

See Paton v. LaPrade, 469 F.Supp. 773 (D.N.J. 1978), 471 F.Supp. 166 (1979) (following remand)(student's rights violated by FBI opening a file on her and conducting investigation after she wrote for information to Socialist Workers Party as part of a social studies course alleged sufficient injury to confer standing).

See also Merriken v. Cressman, 364 F.Supp. 913 (E.D.Pa. 1973)(discussed in §IV.E), where the court struck down on privacy and ultra vires grounds a school's program for collecting personal information from eighth graders in order to identify "potential drug abusers."

E. COLLECTION OF STUDENT INFORMATION BY THE SCHOOL

The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g(c), requires the Secretary of Education to "adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized" by the Secretary of Education or by state or local education agencies. The Act also specifies that "No survey or data-gathering activities shall be conducted by [these parties] unless such activities are authorized by law." Yet, while the Department of Education has adopted regulations which address inspection and review by parents, amendment of records, disclosure to third parties, and enforcement (34 C.F.R. Part 99, discussed in §XII, "Access to Information"), these regulations entirely fail to address the issue of what information can be collected, and in what manner, in "data-gathering activities" in the first place. The regulations do give parents and eligible students the right to request amendments and/or obtain hearings when they believe the information in the records is "inaccurate, misleading or otherwise in violation of the privacy or other rights of students." (34 C.F.R. §99.20-22.)

Independent of the Act, however, the constitutional right to privacy should set at least some limits to the kinds of information which may be collected and maintained on students.

The findings of a federal district court concerning a school program designed to identify "potential drug abusers" among eighth grade students provide a catalog of the kinds of abuses which can occur when the school collects information from its students. Merriken v. Cressman, 364 F.Supp. 913 (E.D.Pa. 1973). Rather than requiring parental consent to collect the data, consent was presumed by parents' silence (914). There was no provision for allowing parents to see the questionnaire beforehand (914). The explanation given to parents was promotional and designed to win parental acquiesence (915). Student consent was not required (914). There were serious dangers of the program operating "as a self-fulfilling prophecy in which a child labelled as a potential drug abuser will by virtue of the label decide to be that which people already think he or she is anyway" (915). Students could be subject to scapegoating by peers because of test results or refusal to take the test (915). Students might feel strong loyalty conflicts because of the questions asked about their families (915). Dangers were also created by the use of the results by school personnel with insufficient qualifications (915). Parents were not informed of these potential dangers prior to their acquiescence (920). "Potential drug abuser" was not defined (915). Very personal questions were asked about family relations, such as whether the parents "make me feel unloved" (916). Students and teachers were asked to identify other students who exhibited "unusual" behavior or remarks (916). The program's mention of confidentiality was not accompanied by specifics (916). A "massive data bank" would be available to various school personnel (916). There was no assurance of protection against third parties with subpoena power (916). Major, often involuntary interventions and referrals would be based upon the data, including programs designed to discourage "deviancy" (916-17). The court notes (920),

> When a program talks about labeling someone as a particular type and such a label could remain with him for the remainder of his life, the margin of error must be almost nil. The preliminary statistics and other evidence indicate that there will be errors in identification.

In permanently enjoining the use of the program, the court held that it violated both students' and parents' constitutional right of privacy; that it unlawfully permitted the school to exercise "the exclusive privileges of parents, extending into areas beyond matters of conduct and discipline, in excess of their power and contrary to law;" and that it would be administered without the "knowing, intelligent, voluntary and aware consent of parents or students" (922).

The First Amendment also provides protection against collection of information about students which chills or inhibits rights of free expression. See §I generally, expecially §I.B.9, "Anonymous Expression," and the discussion of disclosure of organizations' membership lists in §I.B.6, "Association -- Student Organizations." See also §IV.D, "Surveillance and Investigation."

F. DISCLOSURE OF STUDENT RECORDS

The privacy of student records is now protected by certain federal safeguards under the Family Educational Rights and Privacy Act, 20 U.S.C. §1232 (sometimes known as the "Buckley Amendment"), and accompanying federal regulations (34 C.F.R. Part 99). The law applies to all educational institutions which receive funds through federal programs administered by the United States Department of Education. Because the law is discussed more fully in §XII, "Access to Information," only a brief summary is provided here.

Under the federal law, parents have the right to:

-- inspect all recorded information about the student maintained anywhere and in any form by the school system (except personal notes maintained by a teacher or other official which he/she does not disclose to anyone else);

-- obtain copies when information is released to a third party or when denial of copies would effectively deny the right of inspection (copies to be furnished at a reasonable cost which may not include the staff time spent searching for or retrieving the records);

-- give or withhold written consent prior to disclosure to third parties with certain exceptions (most notably school officials within the district who have a legitimate educational interest, the school district to which a student is transferring, and in response to a lawful subpoena or court order);

-- challenge information in the records by requesting amendment or deletion, obtaining a hearing, and/or adding a statement to the file.

These rights belong to the parent alone until the student reaches 18 years of age, except to the extent that the rights are extended to students by the state, the local district, or the parent.

G. PRIVILEGED COMMUNICATIONS

Several states have statutes which protect certain kinds of private communication between students and staff against any legal attempt to require disclosure, such as in judicial proceedings or by subpoena. See, for example:

Connecticut, C.G.S. §§10-154a, 19-69a, 19-496a;
Idaho, Code 9-203, §6;
Maine, 20 Rev.Stat. §806;
Michigan, Statutes, §600.2165;
Montana, Statutes, 93-701-4;
Nevada, Ch.802;
North Carolina, G.S. §8-53.4;
North Dakota, School Code 31-01-06.1;
Oregon, ORS 44.040 (1)(i);
Pennsylvania, 24 P.S. §13-1319;
South Dakota, SDLC §19-13-21;
Washington, RCW 69.54.070.

Some of these statutes state only that the counselor (or other staff person) cannot be forced to testify while others state that the counselor is forbidden from testifying (except with student/parent consent).

Where a privilege exists under state law, it may, depending on the specific wording, protect against the disclosure of certain communications for student disciplinary purposes as well as in court.

Testimonial privileges can also be created by courts under the common law, such as the attorney-client privilege. No common law privilege for student-staff communications has been established in any state, and courts are generally quite reluctant to expand the categories of common law privileged communications in the absence of a statute. Nevertheless, student-counselor communications would seem to fit the standards for common law privileges stated by Wigmore, Evidence, Sec. 2285:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefits thereby gained for the correct disposal of the litigation.

Note that privilege goes considerably beyond the protections of the federal student records act, 20 U.S.C. §1232g (known as the "Buckley Amendment"), discussed in §IV.F and in §XII.A. "Student Records." The federal act normally requires parental consent for disclosure of student records to third parties, but it contains exceptions for disclosure to other school personnel with legitimate educational interests and for disclosure pursuant to court order or subpoena, exceptions which do not apply to privileged communications. (Further, since, under the federal act, "records" do not include personal notes of a staff member not communicated to any other staff member or other person, the federal act does not grant even parental access to such personal communications between student and staff member).

See also American Personnel and Guidance Association, Ethical Standards; and "National Education Association Code of Ethics," NEA Handbook, 233-35 (1975-76); which speak to the professional obligations of school staff regarding student confidentiality.

V. RIGHT TO NOTICE OF RULES AND PUNISHMENTS

It is generally recognized that students are entitled to notice of the rules to which they are subject for purposes of serious discipline (under the Due Process Clause) or restrictions on expression (under the First Amendment and the Due Process Clause). Nevertheless, there is a good deal of variation in the form of notice required and the degree of specificity, depending in part upon whether expression is involved.

A. UNWRITTEN RULES

Some courts will allow schools to act pursuant to unwritten rules if it is demonstrated that the student had oral notice that the conduct was prohibited. Thus, in Hasson v. Boothby, 318 F.Supp. 1183 (D.Mass. 1970), the court permitted a one-year suspension from athletic participation for beer-drinking, finding that the students were aware of the prohibition. The court noted, however, the "desirability of written rules regulating serious disciplinary offenses and penalties" (id. at 1186), and stated:

> . . . this court believes that the imposition of a severe penalty without a specific promulgated rule might be constitutionally deficient under certain circumstances. What those circumstances are can only be left to the development of the case law in the area. However, at this time the court deems relevant the following factors: (1) prior knowledge of the offending student of the wrongfulness of this conduct and clarity of the public policy involved, (2) potential for a chilling effect on First Amendment rights inherent in the situation, (3) severity of the penalty imposed.

Other courts upholding discipline upon finding that the student actually knew, even without written rules, that the conduct was prohibited include:

Dunmar v. Ailes, 348 F.2d 51, 55 (D.C.Cir. 1965);
Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970);
Dunn v. Tyler Independent School District, 460 F.2d 137, 142 (5th Cir. 1972)(dictum);
Zanders v. Louisiana State Board of Education, 281 F.Supp. 747 (W.D.La. 1968);
Speake v. Grantham, 317 F.Supp. 1253, 1270 (S.D.Miss. 1970) (dictum);
Graham v. Board of Education, 419 F.Supp. 1214, 1218 (E.D.Okla. 1976).

Compare:

Kelley v. Metropolitan County Board of Education, 293 F.Supp. 485, 493 (M.D.Tenn. 1968)(one-year suspension from athletic participation illegal in absence of pre-existing standards).

Other courts have indicated a willingness to uphold disciplinary action pursuant to unwritten rules, based on a notion of inherent authority to maintain order, where there is evidence of threat of disruption or other emergency:

Norton v. Discipline Committee of E. Tenn. State Univ., 419 F.2d 195, 200 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970);
Eisner v. Stamford Board of Education, 440 F.2d 803, 808 (2nd Cir. 1971)(dictum);
Buttny v. Smiley, 281 F.Supp. 280, 286 (D.Col. 1968)(dictum);
Barker v. Hardway, 283 F.Supp. 228, 235 (S.D.W.Va. 1968)(dictum);
Grossner v. Trustees of Columbia Univeristy, 287 F.Supp. 535, 552 n.25 (S.D.N.Y. 1968)(dictum);
Speake, supra (dictum);
Haynes v. Dallas County Jr. Col. Dist., 386 F.Supp. 208, 212 (N.D. Tex. 1974).

The reasoning of these cases seems somewhat faulty in that imminent disorder or physical danger may justify emergency action (including very short emergency suspension) but, it would not seem to justify, in the absence of notice of rules, punishment which goes beyond the need to deal with the immediate danger.

Where expression is involved, most courts will be very reluctant to allow punishment or restriction in the absence of written rules, given the First Amendment requirement that any regulation of expression must be quite precise. See:

Cantwell v. Connecticut, 310 U.S. 296, 308 (1970);
Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969);
Sullivan v. Houston Ind. School District, 307 F.Supp. 1328 (S.D. Tex. 1969);
§I.A.3, supra, on clear and precise regulation of expression;
§I.A.4, supra, on requirements for prior restraint regulations;
§I.A.2, supra, on the need for written definition of "disruption;"
§I.A.1, supra, on spelling out definitions of obscenity and defamation.

But see:

Eisner, supra (dictum);
Norton, supra;
Speake, supra (dictum).

Some states require by statute that all rules of conduct be published. See, for example, Massachusetts General Laws, Chapter 71, §37H (enacted after

Hasson v. Boothby). In such states, it can be argued that any discipline not in accordance with the published rules is *ultra vires* (beyond the school's legal authority. *Galveston Independent School District v. Boothe*, 590 S.W.2d 553 (Tex.Civ.App. 1979). See §VI.A. The Massachusetts statute specifically states that rules are not in effect until published and filed with the state commissioner of education, although it may be possible to make the argument even where a state statute merely authorizes the school board to adopt written rules. Similarly, the argument could be made in some states which have administrative procedure acts governing rule-making by state agencies and, in some cases, local government agencies created by the state (such as school boards). These acts sometimes contain requirements that all rules be published in a certain manner. See, e.g., *State Board of Regents v. Gray*, 561 S.W.2d 140 (Tenn. 1978), where the court found that the state administrative procedure act applied to the state university and required that student conduct rules be approved by the state attorney general and filed with the secretary of state, although holding that the act's requirements were met in the case. See also the discussion of state administrative law in §V.E, "School's Failure to Follow Its Own Rules."

Some desegregation decisions,in ordering broad remedial relief to overcome the effects of prior segregation and to insure equitable treatment, have required school systems to develop, publish, and make students and staff members aware of written codes of student rights and responsibilities, including rules of conduct. See:

Evans v. Buchanan, 582 F.2d 750, 772-73 (3rd Cir. 1978) (en banc), *cert.denied*, 100 S.Ct. 1862 (1980);
Bradley v. Milliken, 402 F.Supp. 1096, 1142-43 (E.D.Mich. 1975), *aff'd*, 433 U.S. 267 (1977);
U.S. v. Board of School Commissioners, 506 F.Supp. 657, 672 (S.D.Ind. 1979), *aff'd*, 637 F.2d 1101 (7th Cir. 1980);
Berry v. School District of Benton Harbor, 515 F.Supp. 344, 379-81 (W.D.Mich. 1981) (on appeal).

Where the court finds that oral notice is sufficient, the student still may be able to argue that the rule, as orally communicated, was unconstitutionally vague. See below.

1. LANGUAGE OF THE RULES

Student's Primary Language

The school's duty to provide students with adequate notice of its rules and disciplinary measures takes on a special dimension for students whose primary language is not English. This duty flows alternatively from the Due Process Clause, from anti-discriminaton laws, and, where applicable, from state bilingual education laws.

As a matter of due process, the principles discussed in §V.A, B, and D, under which persons cannot be punished for conduct which they had no reasonable opportunity to know was prohibited, would require that notice of the rules be provided in the students' primary language where the students may not fully understand their meaning in English. (See also VII.E, "Conditions Beyond the Student's Control.")

As to anti-discrimination laws, see §III.A, "Race and National Origin Discrimination." Among the more relevant provisions are the following:

> "A recipient [of federal funds] . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

34 C.F.R. §100.3(b)(2) [regulations implementing Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d].

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by-- . . .
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

20 U.S.C. §1703 (Equal Educational Opportunities Act of 1974).

> "School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English."

Department of Health, Education, and Welfare, Memorandum (May 25, 1970)

See also:
§XI.B on "Language of the Notice;"
§XI.F.2, "Right to Interpreter."

Understandable Language

Whether or not the notice of rules is adequate under the principles discussed throughout §V depends upon the extent to which it is reasonably designed to inform students of what is prohibited. When dealing with students of various ages and educational development, the vocabulary and style of the notice can be relevant in determining its adequacy.

B. VAGUE RULES

Rules which are so vague that they do not tell "a person of ordinary intelligence" what conduct is forbidden and what is not are impermissable under the Due Process Clause of the Fourteenth Amendment and, if they touch upon expression, the First Amendment. The Supreme Court has pointed out that vague laws are unconstitutional for three reasons:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden ares were clearly marked." [Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)(omission and brackets in original) (citations omitted)]

Although the degree of precision required depends in part on the seriousness of the potential punishment, and lower courts sometimes state that school rules generally need not be a precise as criminal laws, the Supreme Court has made it clear that the vagueness doctrine applies outside the criminal context.

> A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925);
> Baggett v. Bullitt, 377 U.S. 360 (1964);
> Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 123 (1967)(dictum).

Degree of Specificity Required

The standard formulation for vagueness of a law or rule is whether persons "of common intelligence must necessarily guess at its meaning and differ as to its application,"

> Connally v. General Construction Co., 269 U.S. 385, 391 (1929);
> Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620 (1976);

or whether it "fails to give a person of ordinary intelligence fair notice that his comtemplated conduct is forbidden," United States v. Harriss, 347 U.S. 612, 617 (1954). One key test of vagueness is the ability to reasonably generate widely different, specific interpretations of the same general rule.

Vague Rules Touching On Expression

As noted by the Supreme Court in Grayned v. City of Rockford, supra, one important reason for striking down a vague rule is that where such a rule may be applied to expressive activities, people who are uncertain of its meaning are likely to avoid altogether activity which the First Amendment protects and is designed to encourage, rather than risk punishment. As the Supreme Court stated in N.A.A.C.P. v. Button, 371 U.S. 415, 433, 438 (1963),

> Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity. . . . Precision of regulation must be the touchstone in an area so closely touching upon our most precious freedoms.

Thus the courts will usually hold schools to a higher standard of specificity where expressive activity may be at issue. A higher standard still is required if the rule is used for prior review or prior restraint of expression.

Vagueness under the First Amendment is closely linked to "overbreadth" (discussed in §V.C. below). Where a rule touching on expression is vague, it will also be overbroad -- i.e., it will prohibit protected activity along with unprotected activity (although a rule may be overbroad without being vague). Thus, courts sometimes do not bother to distinguish First Amendment vagueness from overbreadth.

Vagueness -- As Applied

Normally, a student will win a vagueness challenge only if the rule is vague as applied to him/her. If it is clear that the rule gave the student fair notice that his/her conduct was prohibited, it will not be struck down even if it is not clear what else the rule does or does not prohibit. See U.S. v. National Dairy Products Corp., 372 U.S. 29 (1963). Further, in determining whether the student had fair notice, courts will often look beyond the rule itself to see if the student had sufficiently specific notice because of the way the rule has been consistently interpreted or because of supplementary oral notice. (See discussion of unwritten rules, §V.A, above.)

These limitations on vagueness challenges have much less relevance, however, where First Amendment overbreadth is also involved. If the student can show that the rule's lack of precision makes it substantially overbroad in reaching conduct protected by the First Amendment, it will be struck down as overbroad on its face, regardless of whether or not the particular student's conduct was protected. (See §V.C, "Overbroad Rules.") Thus, a student who is barred from a vagueness challenge because the rule is not vague as applied to him/her may still be able to bring an overbreadth challenge, even if the rule is not overbroad as applied to him/her, unless the degree to which the rule touches on expression is only marginal. See also Village of Hoffman Estates v. Flipside, 102 S.Ct. 1186 (1982).

Cases Holding Rules Vague (and/or Overbroad)

Successful challenges to imprecise rules as either vague (and/or overbroad) include:

Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) ("misconduct");

Eisner v. Stamford Board of Education, 440 F.2d 803 (2nd Cir. 1971) ("distribution of literature");

Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971)("reasonably thought to be disruptive of normal school activity" not sufficient as standard for prior review);

Shanley v. Northeast Independent School District, 462 F.2d 960, 977 (5th Cir. 1972)("distribution"):

Baughman v. Freienmuth, 478 F.2d 1345, 1349-51 (4th Cir. 1973)("libelous or obscene language," "advocates illegal actions," "grossly insulting to any group or individual," "distribution");

Jacobs v. Board of School Commissioners, 490 F.2d 601, 604-05, 609 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975)("significant disruption," "normal educational process, functions, or purposes in any of the Indianapolis schools," "injury to others," "obscene as to minors");

Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975) ("obscene or libelous," "reasonably lead the principal to forecast substantial disruption of or material interference with school activities");

Shamloo v. Mississippi State Board of Trustees, 620 F.2d 516, 522-24 (5th Cir. 1980)(limiting approval of student events to those "of a wholesome nature");

Dickson v. Sitterson, 280 F.Supp. 486, 497-99 (M.D.N.C. 1968)(three judge court)("known member of the Communist Party")("known to advocate the overthrow of the Constitution . . . ," "has pleaded the Fifth Amendment. . . in refusing to answer any question, with respect to Communism or subversive connections, or activities . . . ");

Snyder v. Board of Trustees, 286 F.Supp. 927, 934-35 (N.D.Ill. 1968) (representatives of "any subversive, seditious, and un-American organization");

Smith v. University of Tennessee, 300 F.Supp. 777 (E.D.Tenn. 1969) (speakers without "competence and topic . . . relevant to the approved constitutional purpose of the organization," any speaker who "intends to present a personal defense against alleged misconduct or crime which is being adjudicated," those who "might speak in a libelous, scurrilous or defamatory manner or in violation of public laws which prohibit incitement or riot," speeches at a time which is not "in the best interests of the university");

Stacy v. Williams, 306 F.Supp. 963 (N.D.Miss. 1969)(three judge court) (speakers "who will do violence to the academic atmosphere," "persons in disrepute in the area from whence they come . . . and . . . any person who advocates a philosophy of the overthrow of the United States");

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1344-45 (S.D.Tex. 1969)(rule permitting principal to make regulations "necessary in the administration of the school and in promoting its best interests");

Crossen v. Fatsi, 309 F.Supp. 114 (D.Conn. 1970)(dress code requiring students to be "neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere" and expecting that "clothing and grooming not be of an extreme style and fashion");

ACLU of Virginia v. Radford College, 315 F.Supp. 893 (W.D.Va. 1970) (organizations whose "role and purpose . . . lies [sic] basically outside the scope and objectives of this tax supported educational institution");

Corporation of Haverford College v. Reeher, 329 F.Supp. 1196, 1209-10, 1213 (E.D.Pa. 1971)(three judge court)(college challenged law which required cut-off of financial aid to students for "refusal to obey . . . a lawful regulation or order of any institution of higher education, which refusal, in the opinion of the institution, contributed to a disruption of the activities, administration or classes of such institution", and to students convicted of "a misdemeanor involving moral turpitude");

Marin v. University of Puerto Rico, 346 F.Supp. 470, 473-74 (D.P.R. 1972), 377 F.Supp. 613, 628 (D.P.R. 1973)(three judge court)("acts not authorized by . . . University officials," "improper or disrespectful conduct," acts that will "affect the good, normal functioning of the operations and procedures of the university");

Rasche v. Board of Trustees, 353 F.Supp. 973 (N.D.Ill. 1972)(three judge court)(conduct leading to criminal conviction for engaging in "force, disruption, or the seizure of university property . . . [where] such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution");

Undergraduate Student Association v. Peltason, 367 F.Supp. 1055 (N.D.Ill. 1973)("disorderly disturbance or course of conduct" directed against the administration "or policies" of the college or university "using means which are not protected by the constitution");

Cintron v. State Board of Education, 384 F.Supp. 674 (D.P.R. 1974) ("if the institutional order is affected");

Smith v. Sheeter, 402 F.Supp. 624, 628-32 (S.D.Ohio 1975)("no person, in circumstances which create a substantial risk of disrupting the orderly conduct of lawful activities at a college or university shall willfully or knowingly do any of the following: (1) Enter or remain upon the land or premises of a college or university, or any separate room, building, facility, enclosure or area thereof, without privilege to do so, or, being on or in any such land, premises, room, building, facility, enclosure, or area, fail or refuse to leave upon request of proper authority, and without reasonable justification or excuse for such failure or refusal; . . .;" phrases found vague are underlined);

Brubaker v. Moelchert, 405 F.Supp. 837, 842 (W.D.N.C. 1975)(inviting onto campus those outside groups "whose work is compatible with or supplementary to the educational outreach of the University");

Pliscou v. Holtville Unified School District, 411 F.Supp. 842, 850-51 (S.D.Cal. 1976)("disruption of the orderly operation of the school");

Leibner v. Sharbaugh, 429 F.Supp. 744, 748 (E.D.Va. 1977)("journalistic standards of accuracy, taste, and decency maintained by the newspapers of general circulation in Arlington," "obscenity," "libelous material," "incitements to crime," "material in violation of law or lawful regulation");

Hall v. Board of School Commissioners, 469 F.Supp. 697, 709 (S.D.Ala. 1980) ("political or sectarian," "special interest," "distribution");

Canet Jimenez v. Pietri/Oms, C.A. No. 76-1313 (D.P.R., 9/20/77) (Clearinghouse No. 22,448A) ("clear and present danger that the exercise of students' rights of freedom of expression and assembly would interfere with the institutional order");

Mitchell v. King, 363 A.2d 68 (Conn. 1976) ("conduct inimical to the best interest of the school");

McCall v. State, 354 So.2d 869 (Fla. 1978) ("upbraids, abuses or insults any member of the instructional staff . . . ");

Galveston Independent School District v. Boothe, 590 S.W.2d 553, 557 (Tex.Civ.App. 1979) (rule concerning marijuana possession failed to make it clear that it applied, as school district contended, within 500 feet of school grounds);

State v. Martinez, 538 P.2d 521 (Wash. 1975)(willfully loitering in a school building "without a lawful purpose").

See also:

Papish v. Board of Curators, 410 U.S. 667 (1973)(striking down attempted regulation of underground newspaper containing vulgar language, under rule forbidding "indecent conduct or speech," without specific mention of vagueness or overbreadth);

Paton v. La Prade, 469 F.Supp. 773 (D.N.J. 1978)(striking down postal regulation which permitted FBI mail covers where "necessary to the national security," and which was applied to high school student who, as part of social studies course, wrote to Socialist Workers Party for information).

Cf: Lewis v. Delaware State College, 455 F.Supp. 239, 247 (D.Del. 1978)(lack of notice to director of residence halls that she could be fired for deciding to bear an illegitimate child may be a violation of substantive due process);

PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 4, 1975) (Clearinghouse No. 17,507), rev'd in part on other grounds sub nom. Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976)(reversed because of lower court's failure to award damages to students), rev'd on other grounds, 98 S.Ct.1042 (1978)(reversed on damages issue) (court "would agree" that "gross disobedience or misconduct" is too vague and overbroad as a rule of conduct, but, here it was only a school board regulation which directed individual schools to adopt more specific rules, and students here were disciplined under those more specific rules).

Crossen v. Fatsi, Soglin v. Kauffman, Sullivan v. Houston Independent School District, and Mitchell v. King are all examples of cases in which the court struck down rules on their face as vague on due process/fair notice grounds without resorting to the higher standards applicable to First Amendment/chilling effect grounds (even though the students in both Soglin and Sullivan were engaged in expressive activities). Similarly, in Corporation of Haverford College, the court struck down the "misdemeanor or moral turpitude" portion of the regulation after explicitly using a lower standard because of its "more tenuous connection with First Amendment rights." 329 F.Supp. at 1204, 1214.

Cases Upholding Rules

A variety of cases have upheld school rules against vagueness/overbreadth challenges, but some of these cases are open to challenge. Some, for example, are pre-Tinker or pre-Grayned. Others rest on the notion that the vagueness doctrine does not apply outside of criminal statutes, clearly contrary to A.B. Small and Baggett v. Bullitt, as well as N.A.A.C.P. v. Button, supra. Some find that the rule was clearly applicable to the particular conduct at issue, regardless of possible vagueness in relation to other kinds of conduct -- an adequate rationale for rejecting a vagueness challenge but not adequate, by itself, for rejecting an overbreadth challenge. Often these cases also rest on the court's determination that the particular students' activity was not protected by the First Amendment, but this too seems contrary to the doctrine that overbroad laws which substantially encroach on protected expression can be challenged even by plaintiffs whose conduct could be prohibited by a properly drawn law. A more adequate rationale sometimes used is that the rule has been more narrowly interpreted and consistently applied in a manner which both (1) gives the student notice that his/her conduct is prohibited and (2) is limited to non-protected conduct.

Cases which have rejected vagueness/overbreadth challenges include:

Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970)(students charged with "childish behavior and obscenity toward college officials" and participation in demonstration, under regulation expecting students to "maintain the highest standards of integrity, honesty, and morality" and "to conform to ordinary and accepted social customs and to conduct themselves at all times in all places in a manner befitting a student of Central Missouri State College");

Dunn v. Tyler Independent School District, 460 F.2d 137, 142 (5th Cir. 1972)("walkout," "boycott");

Sill v. Pennsylvania State University, 462 F.2d 463, 468 (3rd Cir. 1972)(disruption defined as action ". . . which unreasonably interferes with, hinders, obstructs, or prevents the regular and essential operation of the University or infringes upon the rights of others to freely participate in its programs and services;" "The regular and essential operation of the University is construed to include, but is not limited to, the operation of its offices, classrooms, laboratories, research facilities, and the right of access to these and any other physical accommodations used in the performance of the teaching, research, and administrative functions and related adjunct activities of the University");

Pervis v. LaMarque Independent School District, 466 F.2d 1054 (5th Cir. 1972)(statute authorizing suspensions for "incorrigible" children, defined under another statute);

Murray v. West Baton Rouge School Board, 472 F.2d 438, 442 (5th Cir. 1973) (state disciplinary statute: "willful disobedience," "intentional disruption," "immoral or vicious practices," "disturbs the school;" but note that the school system had, under the statute, issued its own rules, which plaintiffs apparently did not challenge on vagueness grounds);

Jenkins v. Louisiana State Board of Education, 506 F.2d 992, 1004 (5th Cir. 1975) (gatherings which "disturb the public peace, do violence to any person or property, disrupt the function of the college . . . or . . . bring disgrace or disrepute to the college");

Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (distribution of publication which "Encourages actions which endanger the health or safety of students" applied to advertisement for store selling paraphernalia related to drug use);

Siegel v. Regents of University of California, 308 F.Supp. 832, 836 (N.D.Cal. 1970)(specific wording not quoted);

Whitfield v. Simpson, 312 F.Supp. 889, 896-97 (E.D.Ill. 1970) (statute authorizing suspension for "gross disobedience or misconduct");

Banks v. Board of Public Instruction, 314 F.Supp. 285 (S.D.Fla. 1970), aff'd, 450 F.2d 1103 (5th Cir.), vacated for technical reasons, 401 U.S. 988 (1971)(statute giving principals authority to suspend for "willful disobedience, for open defiance of authority of a member of his staff, for use of profane or obscene language, for other serious misconduct, and for repeated misconduct of a less serious nature;" students suspended for playing marbles and for unauthorized presence in an elementary school; court also noted that statute was different from a school rule in that it was merely a grant of authority and it delegated to local boards the authority to issue rules -- but compare *Sullivan v. Houston Independent School District*, *supra*);

Speake v. Grantham, 317 F.Supp. 1253, 1270-73 (S.D.Miss. 1970) ("obstruction or disruption of teaching, research, administration, disciplinary procedures or other University activities . . . ," "poor citizenship standards in any community");

Lowery v. Adams, 344 F.Supp. 446 (W.D.Ky. 1972)("any disruptive or disorderly conduct which interferes with the rights and opportunities of those who attend the University for the purpose for which the University exists -- the right to utilize and enjoy the facilities provided to obtain an education");

Alex v. Allen, 409 F.Supp. 379 (W.D.Pa. 1976)("flagrant disrespect of teachers," "extreme dress or appearance which is disruptive to class," "loitering in areas of heavy traffic," "rowdy behavior or running in the building," among others);

Davis v. Central Dauphin School District School Board, 466 F.Supp 1259, 1265 (M.D.Pa. 1979)("conduct unbecoming an athlete" not vague as applied to student who struck another student and fractured his jaw);

People in Interest of K.P., 514 P.2d 1131 (Colo. 1973)(statute authorizing suspension or expulsion for "behavior which is inimicable to the welfare, safety, or morals of other pupils;" constitutional on its face);

State v. Williams, 238 N.W.2d 302 (Iowa 1976) (criminal trespass statute using words "harassing," "without legal justification," and "unduly interfering");

Clements v. Board of Trustees, 585 P.2d 197 (Wyo. 1978) (similar holding to *K.P.*, *supra*).

Cf.: *Bilbrey v. Brown*, 481 F.Supp. 26, 28-30 (D.Ore. 1979)(rejecting vagueness challenge to district policy allowing searches of students "only . . . when there is probable cause that the student is concealing evidence of an illegal act or school violation").

It should be remembered that, in many of these cases, the court was not holding that the language cited above is not vague for all purposes, but rather that in the particular case the particular student knew, because of the rule or otherwise, that his/her conduct was prohibited, regardless of the rule's possible vagueness as applied to other situations.

Relationship Between Vague Rules and Unwritten Rules

As §V.A indicates, many courts will uphold discipline in the absence of written rules, at least outside the First Amendment area, if they find that the student actually knew that the conduct was prohibited (e.g., through oral notice). On the one hand, a school might attempt to argue that its vague written rule had been supplemented by more precise oral communication. On the other hand, even where a court holds that a written rule is not necessary, there may still be a vagueness challenge to an orally communicated rule.

C. OVERBROAD RULES

Rules are overbroad when they are drafted in such a way that they prohibit expression or conduct protected by the First Amendment as well as unprotected conduct. In other words, rules must be drawn sufficiently narrowly so that government regulation is kept to the minimum necessary to serve compelling state interests and so that only unprotected conduct is covered. Where a law or rule is drafted so that the prohibitions of protected and unprotected activity cannot be separated, the entire law or rule will be struck down.

Thornhill v. Alabama, 310 U.S. 88, 97 (1940);
N.A.A.C.P. v. Button, 371 U.S. 415 (1963);
Cox v. Louisiana, 379 U.S. 536 (1965);
Brown v. Louisiana, 383 U.S. 131 (1966);
Miller v. California, 413 U.S. 15 (1973).
See: Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (1981).

As stated in §V.B above, vague rules which touch on expression are also overbroad -- their vagueness allows interpretation which could apply them to protected activity. Thus, courts sometimes declare such rules vague under the First Amendment, sometimes overbroad, and sometimes both, with no real difference in treatment. The "overbreadth" cases of this type are listed in the vagueness section above.

On the other hand, a rule can be overbroad -- in prohibiting protected activity -- without being vague, in that it clearly spells out what is prohibited. Courts have struck down rules of this type, for example, in

Jones v. Board of Regents, 436 F.2d 608 (6th Cir. 1970)("hand-out items, including handbills . . . on the campus grounds or in campus buildings at any time" except official program items for meetings authorized by the school);
Jacobs v. Board of School Commissioners, 490 F.2d 601, 604-609 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975)(literature distribution "productive of, or likely to produce" significant disruption [with the court noting that expression does not lose its protection even when it leads to disorder by others unless there is a sufficiently close relationship]; literature not written by students or staff; sale of literature; distribution of literature in exchange for contributions; "commercial activity"; other provisions also struck down as vague are listed in §V.B).
But see:
Sword v. Fox, 446 F.2d 1091 (4th Cir.), cert. denied, 404 U.S. 994 (1971) (banning all demonstrations without prior approval and banning

indoor demonstrations altogether, with demonstration defined as any "public manifestation of welcome, approval, protest, or condemnation as by a mass meeting procession, picketing, or occupation of premises," except for "[e]xhibitions commonly associated with social or athletic activities;" this decision is inconsistent with later Fourth Circuit decisions, such as *Nitzberg v. Parks*, 525 F.2d 378 (1975), as well as *Tinker* and *Grayned*).

This list of cases striking down non-vague rules as overbroad is misleadingly short. In fact, virtually every case in §I, "Freedom of Expression," could be looked at as an overbreadth case in that the court is finding that the school has attempted to prohibit protected as well as unprotected conduct, and in many of these cases the court actually struck down the school rule involved on overbreadth grounds. See, for example, the lengthy case citations in §I.B.4, "Free Press," striking down school attempts to regulate student literature.

Standing and Overbreadth -- Challenges to Overbroad or Vague Rules by Students Who Themselves Were Not Engaged in Protected Activity

As noted in the discussion of vagueness, certain courts have refused to adopt a rigorous First Amendment analysis of vagueness or overbreadth where they have found that the activities of the particular plaintiffs were disruptive or unprotected by the First Amendment and thus could have been punishable even under a more narrowly drawn regulation.

These cases seem to ignore basic Supreme Court doctrine under which overly broad regulations may be challenged even by persons whose conduct could be prohibited under narrower rules.

Dombrowski v. Pfister, 380 U.S. 479, 486 (1965);
Gooding v. Wilson, 405 U.S. 518, 520-21 (1972);
Grayned v. City of Rockford, 408 U.S. 104, 114 (1972)(a school case);
Schad v. Borough of Mount Ephraim, *supra*, 101 S.Ct. at 2181.

Other school cases adopting this rule on standing include:

Jacobs v. Board of School Commissioners, *supra*, 490 F.2d at 606;
Marin v. University of Puerto Rico, 377 F.Supp. 613, 624 (D.P.R. 1974);
Corp. of Haverford College v. Reeher, 329 F.Supp. 1196, 1209 (E.D.Pa. 1971) (three judge court).

In *Grayned*, the demonstrators were found guilty of disruptive conduct which would not be protected, yet the Supreme Court struck down on equal protection grounds the anti-picketing ordinance under which they were convicted, and, while it upheld the anti-noise ordinance under which they were also convicted, it nevertheless declared their standing to challenge it, 408 U.S. at 114:

> Although appellant does not claim that, as applied to him, the anti-noise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.

This doctrine has been limited to some degree, however, by Supreme Court pronouncement that, where a law is aimed mainly at non-protected conduct and plaintiff's conduct itself is not protected, the fact that the law also might be applied to protected conduct is not enough to strike it down on its face unless the overbreadth is "substantial . . . in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The Court indicated that, at least where conduct, rather than "pure speech," is involved, if possibly overbroad applications are relatively minor in comparison to legitimate applications, it will tend to proceed on a case-by-case basis rather than strike down the law on its face.

Summary of Vagueness and Overbreadth

To summarize, a rule which appears vague or overbroad on its face may still be upheld under certain conditions. First, it will generally not be held vague unless it is vague as applied to the student. Second, it will generally not be held vague as applied if it is determined that, through oral instruction, consistent application, etc., the student was on notice that his/her conduct was prohibited. Third, a rule may be challenged as overbroad on its face even if it is not overbroad as applied to the student, provided that (a) the potential for overbreadth is substantial in relationship to its non-overbroad applications and (b) there is no specific, precise, and narrow construction available which could separate the proper from the improper applications.

D. RULES WHICH FAIL TO SPECIFY PUNISHMENT

It can be argued, on substantive due process or ultra vires grounds, that schools must, in addition to notifying students of the rules, spell out what kinds of discipline may be used for violations of which rules. See:

Kelley v. Metropolitan County Board of Education, 293 F.Supp. 485, 493-94 (M.D.Tenn. 1968)(one-year suspension from interscholastic athletics overturned, due process requires that state agency "specify the standards and rules to guide the actions of its subordinates and to delineate forms of punishment for the violation of such rules");

McClung v. Board of Education, 46 Ohio St.2d 149, 346 N.E.2d 691, 695 (1976)(school refusal to include student's picture in high school yearbook because his hair length violated the school's grooming guidelines overturned where guidelines failed to specify punishment for violations).

Cf.: *Farrell v. Joel*, 437 F.2d 160, 163 (2nd Cir. 1971)(procedural due process right to hearing on appropriate sanction even where there is no dispute about misconduct);

Betts v. Board of Education, 466 F.2d 629, 633 (7th Cir. 1972)(same);

Escobar v. State University of New York, 427 F.Supp. 850, 858 (E.D.N.Y. 1977) (denial of due process where, after hearing panel imposed one penalty, president stepped in and, without following school's own procedures, imposed a more severe penalty);

Bradley v. Milliken, C.A. No. 35257, Slip Opinion at 5-6 (E.D. Mich. 7/3/75) (as part of desegregation remedy court ordered district to resubmit proposed student conduct code stating in part that the district's proposal "is extremely vague and general as to possible 'corrective action' to take place in the event of infractions," and mandated that for each listed offense, "the range of corrective be spelled out");

Commonwealth v. Johnson, 309 Mass. 476, 35 N.E.2d 901 (1941) (court held, on ultra vires grounds, that school could not expel students for failing to comply with state law which required flag salutes, since the law did not provide for any specific punishment; constitutional issues not addressed);

Dorsey v. Bale, 521 S.W.2d 76 (Ky.App.Ct. 1975) (school policy of reducing grades for unexcused absences, including absence during suspension, struck down as ultra vires because state law which authorized suspensions was silent on academic punishment).

Compare:

M. v. Board of Education, 429 F.Supp. 288, 291 (S.D.Ill. 1977) (court rejected student's claim that school rule concerning drugs, which specified suspension and referred to possible expulsion, was vague because it did not differentiate between drug offenses meriting suspension and those meriting expulsion);

State Board of Regents v. Gray, 561 S.W.2d 140 (Tenn. 1978) (state administrative procedures act, which required that university's rules and regulations be approved by Attorney General and filed with Secretary of State, did not require that such rules contain sanctions for violating them).

As M. v. Board of Education indicates, complete exactitude, with every single offense always leading to one and only one possible form of discipline, is not required. Disciplinary systems may, for instance, state the most severe penalty which may be applied for each offense and/or reasonably specific criteria for deciding which penalty shall be applied. See:

> Dunn v. Tyler Independent School District, 460 F.2d 137, 143 (5th Cir. 1972) (upholding rule that allows principal to impose lesser penalty than the stated penalty of suspension or to impose no punishment at all).

In fact, it is arguable that a school code which automatically required one and only one particular penalty for each offense would violate the student's due process right to separate consideration of the appropriate sanction. See "Procedural Rights," §XI.G.2, "Determination of Penalty."

E. SCHOOL'S FAILURE TO FOLLOW ITS OWN RULES

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

Morton v. Ruiz, 415 U.S. 199, 235 (1974).

Accord:

U.S. ex rel. Accardi v. Shaugnessy, 347 U.S. 260 (1954);
Service v. Dulles, 354 U.S. 363 (1957);
Vitarelli v. Seaton, 359 U.S. 535 (1959);
United States v. Caceres, 99 S.Ct. 1465, 1471 n.14 (1979).

This basic proposition can be applied to schools under a number of theories, several of which tend to be overlooked.

Due Process

Many courts have reasoned that the requirement that agencies follow their own regulations is mandated by the Due Process Clause. See list of cases cited in U.S. v. Caceres, supra, 99 S.Ct. at 1475 n.1 (Marshall, J. dissenting). Cf. Mabey v. Reagan, 537 F.2d 1036, 1042 (9th Cir. 1976), where the court referred to the requirement as one of "administrative due process." On this theory, suspension from interscholastic athletics was struck down where the athletic association violated its own procedures. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 606 (D.Minn. 1972).

The Supreme Court has recently indicated, however, that Accardi, Service, etc., are based on principles of federal administrative law rather than constitutional law. Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978) (dictum). An agency's violation of its own rules is not automatically a violation of due process per se. See U.S. v. Caceres, supra, 99 S.Ct. at 1471-72. Based on this view, some courts have stated that a school system's failure to follow its own procedures violates due process only where the procedures would be required by due process anyway.

Bates v. Sponberg, 547 F.2d 325, 329 (6th Cir. 1976) (teacher dismissal);
Edwards v. Board of Regents, 397 F.Supp. 822, 829-30 (W.D.Mo. 1975) (student expulsion).
Cf.: Bistrick v. University of South Carolina, 324 F.Supp. 942, 949-52 (D.S.C. 1971) (court held student was accorded adequate due process, without considering the Accardi theory);
Sill v. Pennsylvania State University, 462 F.2d 463, 469-70 (3rd Cir. 1972) (similar to Bistrick);

Hill v. Trustees of Indiana University, 537 F.2d 248, 252 (7th Cir. 1976) (same).

Nevertheless, the school's failure to follow its own regulations, while not a violation of due process per se, may still be a denial of due process in certain circumstances, even when the regulations go beyond the requirements of due process -- if the failure to follow the established regulations itself creates a basic unfairness. See:

U.S. v. Caceres, supra, 99 S.Ct. at 1471-72 and n.14-15;

Warren v. National Association of Secondary School Principals, 375 F.Supp. 1043, 1048 (N.D.Tex. 1974) (removal from honor society raised "additional problem" where, aside from violating constitutional minimums, the school violated its own additonal safeguards);

Hupart v. Board of Higher Education, 420 F.Supp 1087, 1107 (S.D.N.Y. 1976) (affirmative action admissions procedure violated due process because it deviated from university's policy);

Escobar v. State University, 427 F.Supp. 850 (E.D.N.Y. 1977) (while recognizing that "not every deviation . . . constitutes a deprivation of due process," due process was denied where, after a student was sentenced under school's procedures, president stepped in and, without following school's procedures, imposed a more severe penalty).

Compare:

Winnick v. Manning, 460 F.2d 545, 550 (2nd Cir. 1972) (no denial of due process where deviations from school's own guidelines were minor and did not affect fundamental fairness; not every deviation violates due process);

Hillman v. Elliot, 436 F.Supp. 812, 817 (W.D.Va. 1977) (court rejected defendants' argument that the school can never be held accountable under due process for failing to follow rules which go beyond constitutional requirements, but found that here it was the student who failed to exercise these additional rights).

See: Dunn v. Tyler Independent School District, 460 F.2d 137, 143-46 (5th Cir. 1972) (improper for board to violate its own regulations by imposing suspensions of greater than three days while using its procedural regulations for suspension of less than three days; theory unclear);

McCluskey v. Board of Education, 662 F.2d 1263 (8th Cir. 1981) (violation of substantive due process for school board to expel intoxicated student for remainder of semester under its rule providing for mandatory expulsion for being "under the influence of . . . narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended," particularly where said act specifically excluded alcohol);

Cordova v. Chonko, 315 F.Supp. 953, 962-63 (N.D.Ohio 1970) (fundamentally unfair and violative of due process for principal to suspend student for hair length when school board had only given principal authority to regulate dress and cleanliness);

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* rev'd per curiam, 50 U.S.L.W. 3998.25 (7/2/82).

McDonald v. National Collegiate Athletic Association, 370 F.Supp. 625, 627 (C.D.Cal. 1974) (failure to use school's own disciplinary proceedings in declaring athlete ineligible constituted a violation of due process; court's reasoning not discussed);

Assaf v. University of Texas System, 399 F.Supp. 1245 (S.D.Tex. 1975) (where, going beyond constitutional requirements, rule provided that nontenured faculty member would be notified by a certain date if he was not to be reappointed, termination notice received after that date violated due process);

Salvail v. Nashua Board of Education, 469 F.Supp. 1269, 1273 (D.N.H. 1979) (having adopted rules on removal of library books, board was bound to follow them; reasoning not given);

Marshall v. Maguire, 424 N.Y.S.2d 89 (S.Ct., Nassau County, 1980) (while recognizing that not every deviation is a violation of due process, court found due process violation where the same college official participated in each of first two levels of the discipline process, in violation of school rule; opinion is unclear on whether the presence of the rule was central to the holding);

Tedeschi v. Wagner College, 427 N.Y.S.2d 760, 764, 49 N.Y.2d 652 (N.Y.Ct.App. 1980) ("Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed;" meetings with other administrators did not excuse failure to provide review by student-faculty board and by president, as called for in guidelines).

If the student has relied on the school's rule and then suffers because of the school's violation of the rule, a due process violation is especially likely to be found. See:

U.S. v. Caceres, supra, 99 S.Ct. at 1472;
Raley v. Ohio, 360 U.S. 423, 437-38 (1959);
Cox v. Louisiana, 379 U.S. 559 (1965);
Assaf v. University of Texas System, supra.

Cf.: Debra P. v. Turlington, 474 F.Supp. 244, 263-67 (M.D.Fla. 1979) (arbitrary and fundamentally unfair, in violation of due process, for state to change graduation requirements of students already in high school, leaving them inadequately prepared because new skill requirements would have had to be learned much earlier).

Pelley v. Fraser, C.A. No. B-76-C-14 (E.D.Ark., 5/18/76) (Clearinghouse #19,518A) (court granted preliminary injunction against removal from student council of a student who, given an assignment of writing an introduction for a new character "perhaps a teacher just as Chaucer would have written it," wrote a poem clearly directed at the school's principal and "notable only for its crude language and overall bad taste;" "there is a serious due process question presented when a school official attempts to punish a student for complying with an assignment that seems to anticipate exactly the kind of work product that this assignment, in fact, produced");

Peretti v. State of Montana, 464 F.Supp. 784 (D.Mon. 1979).

Thus, where the student acts on the reasonable belief that the school rules permit his/her conduct, it is fundamentally unfair for the school to punish him/her in violation of those rules. This is similar to the principle that the student is entitled to notice of rules and cannot be punished for violating rules of which he/she was not notified. (See §V.A. and B, above on unwritten or vague rules.)

Assaf and *Debra P*. provide another, closely related method for reaching the same result. Since a student is entitled to due process before being deprived of a property interest, and property interests are expectations created by the state or state agencies such as school systems (See "Procedural Rights," §IX.A), school regulations can create expectations which will be treated as property interests which cannot be denied without due process. Thus, in *Assaf*, the court recognized that while non-tenured teachers generally have no property interest in continued employment, such an interest can be created by the system's regulations.

In simple summary the court reasons as follows:

(1) The relevant *Rules and Regulations* provide that a nontenured faculty member will be notified by December 15, if he is not to be reappointed.
(2) The University of Texas System through Dr. Assaf's superiors failed to comply with their own rule of notification.
(3) The failure of notification gave rise to a justified expectation of interest in Dr. Assaf that he would be rehired. Dr. Assaf's right to a contract for at least one more year is in the nature of a property right. [399 F.Supp. at 1250].

The court held that it was fundamentally unfair to then deprive the teacher of that property right by using another rule which put the burden of inquiry on the teacher. *Id*. at 1249. Similarly, the court in *Debra P.* held that the state's pre-existing graduation requirements had created a property interest in receiving a high school diploma upon meeting those requirements, and it was an arbitrary deprivation of that interest to so fundamentally change the requirements so late in the students' school careers. 474 F.Supp. at 266-67. Thus, a student can argue that he/she has a property interest in continued attendance so long as he/she complies with existing rules or regulations, and if the school excludes him/her in violation of its own rules or regulations, it is arbitrarily depriving the student of that property interest without due process. (This is closely related to the contract theory, below.)

But see:

Bicknell v. Vergennes Union High School Board, 638 F.2d 438, 442 (2nd Cir. 1980) (in case concerning board's removal of two books from school library, court stated that the board's locally adopted procedures do not create interests entitled to due process and failure to follow these procedures in removing the book was not a constitutional violation; note, however, that this case does not involve punishment of individuals);

Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306-07 (7th Cir. 1980) (similar ruling).

Another reason for holding that the school's violation of its own rules is a denial of due process is the inconsistent treatment it creates. See:

Hupart v. Board of Higher Education, supra;

United States v. Caceres, supra.

Note, Violations by Agencies of their Own Regulations, 87 Harv.L.Rev. 629 (1974).

This issue of inconsistent treatment, while it can be viewed in due process terms of arbitrariness, is discussed below under "Equal Protection."

For further discussion of substantive due process, see §VI.B.

Equal Protection

If a school does not follow its rules when dealing with a particular student, that student is being treated differently from others and may have an equal protection claim, at least if the difference is not "purely one of form" and has some "discernible effect . . . on the action taken by the agency and its treatment of" the student.

United States v. Caceres, supra, 99 S.Ct. at 1472.

See: Hupart v. Board of Higher Education, supra (admissions procedure violated equal protection because it was a deliberate departure from a contrary policy);

Note, Violations by Agencies of Their Own Regulations, supra at 636 (basic reason for requiring agencies to follow their own rules is the "danger of inconsistent treatments").

Cf.: Bradley v. Milliken, 476 F.Supp. 257, 258 (E.D.Mich. 1979) (in declining to approve district's proposed student reassignment plan, court in desegregation ruling expressed concern that court-ordered student conduct code had not been applied uniformly, with certain infractions resulting in suspension or expulsions in some schools and not in others).

Additionally, where racial descrimination is at issue, deviations from existing practices can be used as evidence of intent to discriminate.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S.Ct. 555, 564 (1977).
See: Yick Wo v. Hopkins, 118 U.S. 356 (1886);
Hupart v. Board of Higher Education, supra.

For further discussion of equal protection and its application to school discipline, see §VI.C.

State Administrative Law and Ultra Vires

As indicated in the due process discussion above, it is a basic principle of federal administrative law that federal agencies must follow their own rules and regulations, at least where those rules and regulations were enacted to protect individuals and are not merely rules of internal administrative convenience.

Accardi v. Shaugnessy, supra;
Service v. Dulles, supra;
Vitarelli v. Seaton, supra;
Morton v. Ruiz, supra;
U.S. v. Caceres, supra.

The notion here is that the administrative law principles require that the agency live by the rule of law and not act arbitrarily or capriciously and that agencies as well as private citizens are bound by the rules which they adopt.

It may be possible to argue in particular states that state administrative law principles similarly require state agencies, including school districts, to follow their own rules and regulations. The argument may be easiest to make where a statute authorizes school boards to adopt rules and regulations which apply to student discipline.

It may also be easier where the state has an administrative procedure act which arguably applies to school districts. Such administrative procedure acts, which in some states apply to state agencies only and in other states to local subdivisions and agencies created by the state (such as school districts), generally set out standards and procedural requirements for rule-making by agencies and for agency adjudications (which decide the rights of individuals), and also provide for state judicial review of agency action -- requiring, for instance, that the court set aside the agency action if it is arbitrary or capricious or if it violates procedures established by law. The analogous federal Administrative Procedure Act, 6 U.S.C. §551-559, 701-706, provides a basis for court challenges of federal agency action which violates the agency's own rules. See U.S. v. Caceres, supra, 99 S.Ct. at 1472-73, and cases cited therein.

With or without an applicable state administrative procedure act, the argument here is basically an ultra vires argument -- that the school is exceeding its authority by violating its own rules, either because it is acting arbitrarily and capriciously, rather than serving the functions which the legislature has authorized, and/or because state laws authorizing it adopt rules and regulations implicitly requiring that it not act in conflict with those rules and regulations.

The possibility of challenging such actions as violating state administrative law principles has generally been overlooked. But see:

Mabey v. Reagan, 537 F.2d 1036, 1042-44 (9th Cir. 1976) (declaring that college was bound to follow its own rules and procedures regarding decisions not to rehire a teacher, even if no hearing was constitutionally required; court reasoned from the state Code of Administrative Procedure, which authorized the college to adopt regulations; case remanded because of dispute as to which set of procedures applied);

Cordova v. Chonko, 315 F.Supp. 953, 962-63 (N.D.Ohio 1970) (where state statute authorized school board to make rules and regulations for student conduct and school board in turn adopted rule authorizing principal to make regulations to insure cleanliness and proper dress, principal acted without authority in making rule and suspending student for hair length);

Davis v. Central Dauphin School District School Board, 466 F.Supp. 1259, 1964-65 (M.D.Pa. 1979) (where school district policy authorized principal and coach to impose indefinite suspension from interscholastic athletics of up to one year, superintendent had no authority to issue such suspensions or to impose a different penalty);

State Board of Regents v. Gray, 561 S.W.2d 140 (Tenn. 1978) (state administrative procedure act applied to state university and required university to comply with it in making and acting upon rules; no violation here, since act, which required that rules be approved by the Attorney General and filed with the Secretary of State, contained exceptions for rules which merely repeated existing laws or were non-binding general policy statements, and the act further provided that a rule could not be challenged for non-filing by someone who had actual knowledge of the rule);

Galveston Independent School District v. Boothe, 590 S.W.2d 553 (Tex.Civ.App. 1979) (where state statute authorized expulsion for violation of promulgated rules, expulsion for one quarter was struck down as ultra vires where district failed to follow its own rules requiring use of other alternatives prior to resort to expulsion and requiring statement of what alternatives have been tried in the expulsion notice letter and where its rule concerning marijuana did not clearly apply to off-campus possession).

See also the general discussion of ultra vires in §VI.A, and the discussion of whether the school can act in the absence of a written rule in §V.A.

Contract

To the extent that the relationship between student and school can partly be seen in contractual terms (see §VI.E), the school's failure to follow its own rules may be a breach of contract. See, for example, Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973 (Sup.Ct., Tompkins Cty., 1975) (using contract standard, court found for student where school violated its own rules by not allowing suspended student and his representative to appear in person before the appeals board, although they had appeared at the prior hearing). For other contract cases, see §VI.E.

Tort (Negligence, Assault and Battery, Etc.)

As discussed in §VI.D, students can bring tort actions against school officials for negligence, assault and battery, etc. The standard defense is usually that the school official was acting reasonably and within the scope of his/her duty. For example, in most states, "reasonable" corporal punishment by school officials for legitimate purposes of discipline is considered an exception to the normal laws governing assault and battery. If, however, the school official is acting contrary to school district rules, he/she may not be able to use the defense that the action is reasonable and within the scope of his/her duties. See:

McKinney v. Greene, 379 So.2d 69 (La.App. 1980).

But see:

Streeter v. Hundley, 580 S.W.2d 283 (Mo. 1979) (rejecting assault and battery claim where teacher failed to follow a portion of the district's corporal punishment rule, since that part of the rule which was violated was not designed to avoid the injury which occurred here and the punishment was otherwise "reasonable").

Compare:

Board of Education v. Shank, 542 S.W.2d 779 (Mo. 1976) (upholding the firing of a teacher for willful and persistent violation of board regulation concerning corporal punishment).

For other cases, see:

§VI.D, "Tort Actions (Assault and Battery, Negligence, Etc.);"
§VIII.B, "Corporal Punishment and Similar Abuses."

State Common Law of Associations

In some states, court doctrine has developed a state common law of associations, under which individuals who belong to an organization have certain rights concerning fair treatment concerning the protection of the relationship to the organization and the status which it confers.

One such right is often the right to expect that the organization will follow its own rules in dealing with its members. For a good discussion of these principles, see Clayton v. Trustees of Princeton University, 519 F.Supp. 802, 804-06 (D.N.J. 1981), where the court found that New Jersey recognizes a common law of associations, that this law applies to the student-university relationship, and that it requires the organization to substantially comply with its own rules, including disciplinary procedures. (For more on this doctrine, see subsection C. of §XIV, "The Legal Rights of Students in Private Schools.")

VI. UNREASONABLE, EXCESSIVE, OR UNAUTHORIZED RULES OR PUNISHMENTS -- GENERAL LEGAL CONCEPTS

Advocates often face a situation in which no specific statute or constitutional right has been violated by the school, and yet the school's rule or disciplinary action seems basically unfair. There are three relevant legal concepts which may be of use: ultra vires (§A) (i.e., beyond the powers which the legislature has granted the school system), substantive due process (§B), and equal protection (§C). All three most often turn on whether there is some reasonable or rational relationship between the action taken and a legitimate authorized function or objective of the school system. Generally, however, where no other specific law or constitutional right is involved, the school's action will be presumed to be reasonable, and the burden will be on the student to demonstrate otherwise. The ultra vires doctrine, however, has some additional branches, under which the school system will not always be permitted to argue on the basis of "reasonableness," if its actions are not specifically authorized by state statute or if the legislature has authorized a different approach.

Other state law concepts which may be useful are tort actions, such as assault and battery, negligence, intentional infliction of mental distress, etc. (§D); and actions for breach of contract (§E). The latter may be one useful way of dealing with a school's violation of its own rules, the problem discussed in §V.E, above.

A. ULTRA VIRES -- BEYOND THE AUTHORITY GRANTED TO THE SCHOOL BY THE LEGISLATURE

School systems are created by the state legislature and only have those powers granted to them by the state legislature. Therefore, the school's action is *ultra vires* (beyond its authority under state law) if that action has not been authorized by legislation. The school's action must be specifically authorized by the state statute (explicit authority) *or* it must be reasonably related to carrying out those functions which are specifically authorized (implicit authority). See:

Gelhorn and Byse, *Administrative Law: Cases and Comments*, 58 (6th ed. 1974);
Dillon, *Commentaries on the Law of Minicipal Corporation*, §89 (1st ed. 1890) ("Dillon's Rule");
McQuillan, *The Law of Municipal Corporations*, §4.01-4105 (1966, Supp. 1974).

Whether or not the school's action is *ultra vires* will often depend upon the reasonableness of the action. If, for example, a student is suspended for smoking, and no state statute specifically authorizes school systems to suspend for smoking, the student can argue that the action is *ultra vires*. The school will argue in response that it has implicit authority to do so as a reasonable means of preserving the proper order and atmosphere necessary to carry out either its explicitly delegated function of providing education or its implicitly delegated functions of protecting the health and safety of students in school. It may also attempt to rely on, for example, a very general state statute authorizing suspension for misconduct.

Depending upon what state statutes do exist, there are three types of arguments the student can then make:

(1) that the rule or action is in fact not reasonably related to carrying out the explicitly authorized functions (the burden is usually on the student to demonstrate clear unreasonableness and most courts will be reluctant to second-guess the wisdom of the action or substitute its judgment for the school's);

(2) that the issue is not "reasonableness" because the state legislature has adopted a different course of action and has thereby ruled out this particular course of action, reasonable or not (e.g., there is a statute which contains specific grounds for suspension and which does not include smoking);

(3) that the school cannot rely on a very general grant of authority, explicit or implicit, because the legislature is responsible for legislating and cannot delegate that responsibility away to another body, such as a school board, without giving that body some form of statutory standards -- i.e., that any action is ultra vires unless authorized by a relatively specific statute.

For more extensive analysis of ultra vires doctrines, see:

Stephen R. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 Univ. Pennsylvania Law Review 373 (1969).

(1) Arguing That There Is No Rational Relationship to an Authorized Function

This line of argument has three possible subparts:

(a) that the function identified by the school is not an authorized function (e.g., that discouraging pregnancy is not a school function authorized by the legislature);

(b) that, assuming the function is authorized, the rule the student violated in fact does not serve that function (e.g., that a particular dress code does not contribute to an orderly atmosphere);

(c) that, assuming the rule serves the authorized function, the punishment inflicted for violating the rule does not (e.g., that suspending students for skipping class does not increase the likelihood of students acquiring education, or that the corporal punishment inflicted upon a student was so excessive or unreasonable that it was not rationally related to enforcing the rule which the student violated).

In making any or all of these arguments it must be remembered that the burden is generally placed on the student to demonstrate the absence of a rational relationship and that courts repeatedly state that, in the absence of a clear demonstration, they will not substitute their judgement for that of school officials. Nevertheless, courts have held, on ultra vires grounds, that disciplinary action was not rationally related to a legislatively authorized school function in cases dealing with:

--grooming regulations (§VII.A);
--outside activities (§VII.B);
--marriage, pregnancy, and parenthood (§VII.C);
--conditions beyond the student's control (such as accidents or the actions of the parent) (§VII.E);
--exclusions which were too lengthy in relationship to the misconduct (§VIII.A);

--excessively harsh corporal punishment (§VIII.B);
--lowering of grades or loss of credit as a disciplinary tool (§VIII.C);
--exclusion from graduation (§VIII.G).

Also:

Coats v. Cloverdale Unified School District Governing Board, No. 80029 (Cal.Super.Ct., Sonoma County, 1/20/75) (Clearinghouse No. 14.462) (mandamus issued where student was given a failing grade in physical education, thereby preventing his graduation, for refusal to run laps around the gymnasium as punishment for being on the losing side of a volleyball game, based on court's finding that the action appeared to be ultra vires and/or in violation of substantive due process and/or equal protection);

DeMarco v. University of Health Sciences, 352 N.E.2d 356 (Ill.App. 1976) (dismissal for failure to make financial contribution to the school arbitrary and unreasonable);

State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo.App. 1977) (student had missed last eight weeks of junior year following a suspension, with some doubt as to whether this absence was voluntary and not coerced by the principal; held unreasonable and discriminatory to then, at end of senior year, deny him a a diploma and require that he reenroll for another eight weeks under board policy requiring eight semesters of enrollment, even though he had obtained the required number of credits);

Detro v. Miami University, CV 72-05-0336 (Ct.Com.Pleas, Butler Cty., Ohio, 12/27/72) (rational to impose $15 fine for violation of motor vehicle rule, but withholding grade and diploma for failure to pay fine is "unusual and unreasonable punishment and is unenforceable" against a first offender);

Hailey v. Brooks, 191 S.W. 781 (Tex.Civ.App. 1916) (rule forbidding students to buy food and supplies from outside sources held unreasonable);

State ex rel. Bowe v. Board of Education, 63 Wis. 234, 23 N.W. 102 (1885) (suspension for refusal to carry firewood not "needful" for proper purposes of the school).

Compare:

Casey County Board of Education v. Luster, 282 S.W.2d 333 (Ky. 1955) (school may prohibit students from leaving school during lunch period);

Fitzpatrick v. Board of Education, 54 Misc.2d 1085, 284 N.Y.S.2d 590 (1967) (same)

Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926) (same).

(2) Arguing That the Legislative Scheme Has Ruled Out the School's Action by Omission

If the legislature has spelled out in statutes how a particular function is to be carried out, and has not included the means used by the school, it is much easier to argue that the school's action is ultra vires.

regardless of whether the action might otherwise be a reasonable way of accomplishing the authorized function. This applies, for example, to a suspension for smoking where a state statute spells out relatively specific grounds for suspension and does not include smoking. Similarly, if a state statute authorizes superintendents to suspend students but does not mention principals, a suspension by a principal would be ultra vires.

Thus, in Dorsey v. Bale, 521 S.W.2d 76 (Ky.App.Ct. 1975), the court held that it was illegal to reduce grades for unexcused absences including suspension, since the state statute which authorized suspension was silent on academic punishment.

In Howard v. Clark, 299 N.Y.S.2d 65, 59 Misc.2d 327 (1969). the court held that suspension of a student for being criminally charged with heroin possession off school property was not justified under the grounds for suspension set forth in the state statute (which included suspension for conduct which was insubordinate, disorderly, or otherwise dangerous to the health, safety, morals or welfare of self or others), and there is no inherent authority to suspend for reasons not stated in the statute.

In In re Blackman v. Brown, 419 N.Y.S.2d 796 (Sup.Ct., Ulster County, 1978), a rule under which a student who missed class 48 days was removed from class and given a failing grade was held to be ultra vires since the legislature had adopted a different scheme for addressing truancy. The state suspension statute (see above) was held not to authorize the action. On the same basis, suspension was held not to be authorized for truancy. King v. Farmer, 424 N.Y.S.2d 86 (Sup.Ct., Westchester Cty., 1979).

In Gutierrez v. School District R-1, Otero County, C.A. No. 12160 (Colo.Dist.Ct., Otero County, 5/31/78) (Clearinghouse No. 25,218A,B), aff'd, Appeal No. 78-584 (Colo.App.Ct., 10/12/78) (Clearinghouse No. 25,218C), the court struck down a district policy under which students lost all credit for any course in which they had seven absences in one semester, including absences due to illness or suspension. Despite the existence of a statute giving districts the authority to issue rules concerning student conduct, discipline, and study, the court declared the rule ultra vires because the legislature had enacted a scheme for enforcing compulsory attendance, and this scheme did not include such rules. In affirming, the court of appeals focused on a somewhat different aspect -- the fact that another state statute provided that days missed because of illness or suspension would be counted toward the required 172 days of school attendance.

A Florida Attorney General Opinion, No. 075-148 (May 29, 1975), in stating that school districts in Florida have no authority to suspend or expel students within the compulsory school age for unexcused absence or truancy, provides a clear example of the doctrine:

> A statute which enumerates certain things on which it is to operate or forbids certain things must be construed as excluding from its operation all things not expressly mentioned therein. . . . The

> compulsory attendance laws specifically direct how such cases are to be investigated, reported and prosecuted, either against the parent or child or both in appropriate cases. The school board and the superintendent of schools are without jurisdiction or authority to suspend or to expel a child for unexcused absences or truancy. [page 5]

The California Attorney General took a similar position in declaring that reduction of course credit for missing classes was *ultra vires*, since the legislature addressed truancy and did not provide for such a penalty. *Opinion of the Attorney General*, No. CV 74-145 (8/13/75).

In *Burton v. Board of Education*, 71 Cal.App.3d 52, 139 Cal.Rptr. 383 (1977), a state law provided that if a district used corporal punishment, it could do so only with the written consent of the parent. The Pasadena Board of Education told parents of children in the district's voluntary "fundamental schools" that if they did not sign consent forms, their children would be transferred to other district schools. The court rejected the district's reliance on the fact that parents have no legal right to have their children attend a particular school and held that the district's policy was *ultra vires*, stating, "A school district is an agency of limited authority, which may exercise only those powers granted by statute . . . Neither school boards nor any other administrative agency may set additional terms which frustrate rights created by statute." 71 Cal.App.3d at 57, 58.

In *Commonwealth v. Johnson*, 309 Mass. 476, 35 N.E.2d 801 (1941), the court, without reaching constitutional issues, held it *ultra vires* to expel students under a statute which required flag salutes because the statute provided no specific punishment.

See also *Davis v. Central Dauphin School District School Board*, 466 F.Supp. 1259 (M.D.Pa. 1979), in which the court held that where state statutes gave teachers, vice principals, and principals charge over student conduct and gave principals and school boards the power to suspend, the general authority of the superintendent did not include the authority to suspend. The court also made a similar judgment under the district's own rules.

See *Cordova v. Chonko*, 315 F.Supp. 953 (N.D.Ohio 1970), discussed more fully below, where the court extended these principles to the relationship between the local school board and school officials. The court held that where a state statute authorized school boards to adopt student conduct rules and the school board in turn adopted a rule requiring the principal to regulate clothing and cleanliness, the principal had no authority to regulate hair length.

See also:

Matter of Mooney, 180 N.Y.L.J. No. 28, p.12 (8/10/78) (Clearinghouse No. 25,136A) (principal exceeded his authority by suspending two students where (a) state law permitted school boards to delegate to principal authority to suspend for up to five days but there was not evidence that the board had done so; (b) there was no opportunity for a conference as required by the statute; (c) in any event, the suspensions exceeded the statutory time of five days.

Cf.: Armstrong v. Board of Education, 430 F.Supp. 595 (N.D.Ala. 1977) (board cannot rely on its general powers to unilaterally fire employee or eliminate funding for his position where state statute provided for superintendent's consent to such actions).

Thus, where the legislature has acted in a particular area, and has spelled out a scheme for school system action, the school should not be able to rely on some notion of inherent authority or "reasonableness" to take actions which have been omitted from the legislative scheme.

(3) Arguing That A Very General Grant of Authority to Regulate Discipline Is Not Enough -- The Delegation Doctrine

Here the argument is that the legislature is responsible for legislating and cannot delegate that responsibility away to another body, such as a school board, without giving that body some standards. See e.g.,

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935);
Gelhorn and Byse, Administrative Law: Cases and Comments, 58 (6th ed. 1974).

Thus, the school board should not be able to rely on very general explicit or implicit power to maintain discipline in the absence of more specific standards. This argument undermines the school's ability to rely on "reasonableness" in fighting an ultra vires challenge.

One of the clearest statements of this doctrine appears in Alexander v. Thompson, 313 F.Supp. 1389 (C.D.Cal. 1970), where the court struck down a school's dress and grooming rule. The school argued that the rule was authorized by a state statute, California Education Code §1052, which provides:

> The governing board of any school district shall prescribe rules not inconsistent with law or with the rules prescribed by the State Board of Education, for the government and discipline of the schools under its jurisdiction. [Emphasis added.]

The court rejected this attempted reliance:

> Governing Boards of School Districts in California are administrative

> agencies created by statute and are invested only with the powers expressly granted to them. . . . [1394]
>
> A necessary condition to the validity of a rule promulgated by a local school board would be that it is relevant to the educating function. . . . If a rule meets that test, however, it does not end judicial inquiry into its validity.
>
> Basic to our societal and governmental structure is the assumption that certain areas of conduct, if subject to any governmental regulation at all, should be regulated by the legislature. The presumptions of our system of government also require that such regulations be as explicit as possible where delegation to an administrative agency is involved. Hence, a general grant of power to a local school board should not be construed to enable it to make decisions of the type that are generally and more appropriately reserved for the legislature. . . . [1395]
>
> The doctrine of a primary standard to be fixed by the legislature (as an integral part of delegations of rule-making authority) has been developed by the courts to guard against arbitrary administrative action.
>
> Power to determine the policy of the law is primarily legislative and cannot be delegated. The legislature must perform the policy-declaring function itself. . . . Thus the California Legislature has not authorized school boards to restrict dress and personal appearance of students attending public schools. At best, all that has been declared is the legislative policy that school boards have power to make rules to maintain "discipline", but no attempt has been made by the State Legislature to define the scope of that term or relate it to dress or hair style. Nor has any showing been made by defendants here, that the intent of legislature was to reach the type of conduct at issue in this case under such a broad term as discipline. . . . [1395-96]
>
> If the California Legislature within constitutional limits deems student dress and appearance a proper subject for public policy pronouncements and appropriate regulation, it has an obligation to say so and establish a uniform standard applicable to all school districts. [1396-97]

Note that the court in Alexander did not rule that the legislature had improperly delegated its authority. Instead, because of the delegation doctrine, the court refused to assume that the legislature had made such a broad grant of authority, and it thus held that the school system had acted outside of the powers granted it by the legislature.

See also:

Cordova v. Chonko, supra;

Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555 (Iowa 1972) (school board cannot delegate its rule-making functions to state-wide athletic association, which had adopted an athletic rule concerning use of drugs and alcohol);

Commonwealth v. Johnson, supra;

In re Blackman v. Brown, supra ("there appears to be no specific grant of authority . . . and such authority should not be implied from any grant of general supervisory powers when the net effect is that a pupil who violates the compulsory education law often enough is excused from further compliance").

It should be cautioned that not all courts can be expected to adopt the approach taken in Alexander. In at least some states, the argument that school boards cannot act under a very broad grant of authority because legislative or policy responsibility cannot be delegated away by the legislature will probably be met by a strong judicial belief in the need for local school board control and flexibility. Careful attention should be paid to the often extensive case law in each state addressing delegation issues outside the student discipline context.

Ultra Vires and Delegation Applied to Relationship Between School Board and School Officials

In Cordova v. Chonko, supra, the court took the same ultra vires and delegation principles which have usually been applied to the relationship between the legislature and the local school board and extended them to the relationship between the school board and school officials. Under a state statute which authorized school boards to "make such rules and regulations as are necessary for . . . the government of . . . pupils . . . ," the school board had adopted a rule requiring students to be "properly clad and clean in person in accordance with the rules and regulations established by the building principal" and permitting the principal to send offending students home "to be properly prepared for the school room." The court stated, 315 F.Supp. at 962-63:

> Assuming, without deciding, that the Board of Education might properly delegate to an administrative employee the power to make rules and regulations to the extent permitted by the rule, it is clear that the rules and regulations so established must be limited to those subjects specified in the Board's rule 7, that is dress (they shall * * * be properly clad) and personal cleanliness (they shall * * * be * * * clean in person). The distinction between rules covering these subjects and rules covering hair styles is clear. . . .
>
> It should be pointed out further that the rule of the Board of Education delegating to the building principal authority to make dress regulations does not authorize him to fix penalites for violation, for it already carries with it the penalty. . . .
>
> The Court is thus irresistibly impelled to the conclusion that, there being no valid rule of the defendant Board of Education with respect

> to hair styles of pupils in its school, the defendant Chonko was acting beyond his powers in establishing such a rule, and in attempting to enforce it by the drastic penalty of suspending the plaintiff from school.

The court then ruled that, because the suspension was unauthorized, it was so unjust that it deprived the student of due process, despite its finding that the school board itself could properly regulate hair length. (See §VI.B, below, on substantive due process.)

In _Davis v. Central Dauphin School District School Board_, _supra_, the court found that, where the district's own rules gave authority to principal and coach to suspend students from athletics, superintendent did not have such authority, despite policy giving the superintendent general "supervision over all matters directly or indirectly affecting the operation of the school district."

See also:

Bunger v. Iowa High School Athletic Association, _supra_;
Matter of Mooney, _supra_.

As should be clear, the issues here are very closely tied to whether the school system has a legal obligation to follow its own rules. See §V.E. above.

In Loco Parentis

School systems sometimes claim that their power is not limited to that which has been authorized by the legislature and that they also have been granted power by parents under the doctrine of _in loco parentis_ ("in the place of the parents"). This doctrine is now largely discredited -- except where either the parent actually has specifically authorized the school to carry out certain functions or where the legislature has authorized the school to carry out those functions. In the latter case, the issue is really one of legislative authorization and the _ultra vires_ principles above still apply.

The reasons for the doctrine's falling into disuse largely stem from its having been developed during a time when education was not regarded primarily as a state function, was not compulsory, and was more generally a voluntary arrangement between parent and teacher in which the parent did in fact authorize the teacher to carry out certain parental functions of education and care. It was also developed during a time when students were not considered to have constitutional rights, and the doctrine has also been eroded by court cases recognizing those rights.

Where the doctrine is still cited at all it is usually in _dicta_, the court having decided the case on other bases, or the court is really referring to power granted by the legislature.

B. SUBSTANTIVE DUE PROCESS

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."
>
> United States Constitution, Amendment XIV

The due process required for depriving students of liberty or property interests includes proper procedures designed to guard against erroneous decision, such as notice and hearing. This is known as "procedural" due process and is discussed in the Procedural Rights portion of this manual (§§IX-XI). Due process also demands, however, that any action which deprives the student of liberty or property interests be a decision which can be justified in terms of the outcome, as well as the procedure by which it was reached, and this is known as "substantive" due process.

Where the liberty interests are recognized as "fundamental" under the Constitution, the required level of justification is quite high, and the state must demonstrate (a) its action actually serves a compelling, highly important state interest; and (b) that there is no reasonable alternative means of serving that state's interest which would result in less deprivation of the individual's liberty interests. Liberty interests which are treated as "fundamental" in this manner include those rights contained in the Bill of Rights, such as the First Amendment rights of expression (see §I) and the Fourth Amendment right to be free of unreasonable search and seizure (see §IV.B), as well as certain liberty interests which are not specifically mentioned in the Constitution but which are nonetheless treated as "fundamental," such as the right of privacy (see §IV.A) and the right to be free of punishment in the absence of personal or individual guilt (see §VII.E).

There are other interests, however, which are not generally recognized as fundamental, but which are nonetheless protected liberty or property interests, such as (a) the student's state-created property interest in his/her education, (b) the student's liberty interest in being free of government action which damages his/her good name and reputation or which imposes a "stigma" that cuts off future employment or educational opportunities, or (c) the student's liberty interest in being free from intrusions on personal security or from bodily restraint and punishment. (These and other liberty and property interests are summarized and discussed in §IX.A., "When Entitled to Due Process: Property/Liberty Interests.")

When the liberty or property interest is not recognized as "fundamental," substantive due process requires a lower standard of justification. State action which deprives a student of such interests violates due process if it is shown to be arbitrary, capricious, unreasonable, fundamentally unfair, or not reasonably related to some legitimate state objective; or if the punishment is greatly disproportionate to the offense.

St. Louis, I.M. & S. R.R. v Williams, 151 U.S. 63, 67 (1919);
Chicago & Northwestern R.R. v. Nye Schneider Fowler Co., 260 U.S. 35, 44 (1922);
Bell v. Burson, 402 U.S. 535 (1971);
Vlandis v. Kline, 412 U.S. 441 (1973);
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Where the property or liberty interest at stake is not fundamental, the courts will usually presume that the school's action is reasonable, and the burden will be on the student to prove it is arbitrary, etc. It is this lower standard of arbitrary, unreasonable, etc. that is most often thought of as a "substantive due process" issue. Note the similarity between this and the "reasonableness" standard which is one branch of ultra vires [see §VI.A.(1).]

Student cases dealing with substantive due process are discussed below in §VII, "Challenging Specific Types of Rules," including:

§VII.A, "Dress and Grooming;"
§VII.B, "Outside Activities;"
§VII.D, "Offenses Related to Non-School Laws;"
§VII.C, "Marriage, Pregnancy, Parenthood;"
§VII.E, "Conditions Beyond the Student's Control (such as accidental damage and parent's actions);

and in §VIII, "Challenging Specific Types of Punishment," including:

§VIII.A, "Exclusion (Suspension, Expulsion, Etc.);"
§VIII.B, "Corporal Punishment and Similar Abuses;"
§VIII.C, "Academic Punishment (Grade Reductions, Etc.); Other Responses to Attendance Offenses;"
§VIII.D, "Disciplinary Transfer;"
§VIII.F, "Exclusion from Extracurricular Activities;"
§VIII.G, "Exclusion from Graduation Ceremonies;"
§VIII.H, "Work as Punishment;"
§VIII.K, "Exclusion from School Bus."

Substantive due process notions of fundamental fairness and arbitrariness are also involved in the student's due process right to expect that he/she will not be punished for breaking rules without having been put on notice of those rules, and the right to expect that the school will follow its own rules. (See cases in §V.A, B, D, and E.)

In raising a substantive due process challenge in any one of the above specific areas, it may be important to check the cases in each of the other areas for general substantive due process principles.

For further commentary, see Michael J. Perry, "Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases," 71 Nw. U. Law Rev. 417 (1976).

C. EQUAL PROTECTION

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."
>
> United States Constitution, Amendment XIV

Rational Relationship Test *

Excessive, unreasonable, or discriminatory discipline may violate a student's right to equal protection under the Fourteenth Amendment. At a minimum, when the state treats one set of persons differently from another, the difference in treatment must have some rational relationship to some legitimate state purpose. The school treats students who have broken school rules differently from students who have not by punishing the former, and both the rule and the punishment must therefore bear at least a minimal relationship to one of the school's authorized purposes. The standard is thus quite similar to the substantive due process standard (see §VI.B), and it is violated when the punishment can be shown to be excessive, disproportionate, unreasonable, or unrelated to the accomplishment of the school's legitimate tasks. As with substantive due process, actions challenged under this equal protection standard will be presumed rational, and the student will have the burden of proving otherwise.

Compelling State Interest Test

The school will be held to a higher standard -- under which it must demonstrate that its action is necessary to serve some "compelling," highly important state interest and that there is no reasonable alternative means of serving that interest -- if the rule or punishment infringes upon fundamental rights (such as rights of free expression or the right to vote) or if the difference in treatment is based upon a suspect classification (such as race). This strict-scrutiny test is once again quite similar to the higher substantive due process standard where the state deprives a person of a "fundamental" liberty interest. (See §VI.B.)

(a) Fundamental Interests - First Amendment

For application of the strict scrutiny test to fundamental First Amendment rights, see §I, especially §I.A.5, "Inconsistent Application," and §I.B.3.a, "Equal Access to Existing Forums."

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* As this book went to press, the Supreme Court issued its decision in Plyler v. Doe, ___S.Ct.___, 50 U.S.L.W. 4650 (6/15/82). This decision may have important implications for equal protection standards in education cases. It is discussed at the end of this section.

*(b) Education as a Fundamental Interest?**

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court rejected a challenge to the state's school financing system and held that no fundamental interest to education was involved where there were relative differences in school districts' spending levels for education. Thus, *at the federal level*, it is probably not possible to argue that any *non-permanent* suspension, as a relative deprivation of education, must be justified under the "compelling state interest" test, unless there is some other fundamental interest involved.

Nevertheless, the Supreme Court did leave open the possibility that education might be regarded as a fundamental interest under the *EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT* where there is "an absolute denial of educational opportunities" and/or "the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Rodriguez*, *supra*, 411 at 37. This language raises the possibility that the equal protection clause forbids permanent expulsions or other actions equivalent to a total deprivation unless the school system can show a compelling state interest which cannot be served through any less drastic means.

One lower court has actually held, using the language in *Rodriguez*, that access to education is a fundamental interest and that "the absolute deprivation of education triggers strict judicial scrutiny." *In re Alien Children Education Litigation*, 501 F.Supp. 544, 564, 582 (S.D.Tex. 1980),** *prob. juris. noted*, 101 S.Ct. 3078 (1981) (exclusion of children of undocumented aliens violates equal protection). After discussing the testimony on the impact of excluding children from education, the court stated:

> In summation, the court concludes that strict judicial scrutiny should be applied to determine whether this statute violates the equal protection clause. The bases for this conclusion are the following: the statute absolutely deprives undocumented children of access to education, thereby causing them great harm; there is a direct and substantial relationship between education and the explicitly guaranteed right to exchange ideas and information; and, the provision of education is not a social or economic policy, but a state function. Additionally, recognizing the right to access of education when it is being provided to others does not imply the right to equal enjoyment of education. [564]

Other lower federal courts have relied on the statement in *Rodriguez* to indicate that there *may* be a constitutional right to a certain minimal level of education.

Fialkowski v. Shapp, 405 F.Supp. 946, 958 (E.D.Pa. 1975) (denying motion to dismiss);
Frederick L. v. Thomas, 408 F.Supp. 832, 835 (E.D.Pa.) (denying motion to dismiss), *judgment for plaintiff on state claim*, 419 F.Supp. 960

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* See discussion of *Plyler v. Doe*, *infra*.

** *Aff'd on other grounds*, *sub nom*. *Plyler v. Doe*, *supra*.

(1976), *aff'd*, 557 F.2d 373 (3rd Cir. 1977);

Colorado Association for Retarded Children v. Colorado, C.A. No. C-4620 (D.Colo., July 13, 1973) (denying motion to dismiss);

Doe v. Plyler, 458 F.Supp. 569, 580-81 (E.D.Tex. 1978), *aff'd*, 628 F.2d 448, 456-68 (5th Cir. 1980), *aff'd on other grounds*, *supra* (see discussion below) (strict scrutiny may be applicable where there is an absolute deprivation of educational opportunity; unnecessary to decide issue here because exclusion of children of illegal aliens fails to meet even rational relationship test);

Kruse v. Campbell, 431 F.Supp. 180, 186-88 (E.D.Va. 1977) (three-judge court) (total deprivation of meaningful opportunity to enjoy appropriate education by handicapped students irrational under the Equal Protection Clause, referring to the possibility raised in *Rodriguez*), *vacated and remanded*, 98 S.Ct. 38 (1977) (vacated and remanded with directions to decide the case on the basis of the federal statute, Sec. 504 of the Federal Rehabilitation Act, instead);

U.S. v. Texas, 506 F.Supp. 405, 428-29 n.12 (E.D.Tex. 1981) (on appeal).

Certain *state* courts are willing to declare that education is a fundamental right under the *STATE'S EQUAL PROTECTION CLAUSE*, thus interpreting that state clause more broadly than the federal clause even when they read identically, in part because of the references to education in other portions of the state constitution. See, for example:

Serrano v. Priest, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (Cal.Sup.Ct. 1976), *cert. denied*, 97 S.Ct. 2951 (1977);

Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (striking down school finance scheme);

Sneed v. Greensboro City Board of Education, 264 S.E.2d 106, 113 (N.C. 1980) (school fees case);

Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979) (school finance case; court also defines the "high quality standards" which it holds the state's education clause mandates, and it extensively reviews judicial interpretation's of other states' constitutional provisions; on May 14, 1982, the Kanawha County Circuit Court, on remand from the Supreme Court's opinion above, spelled out in detail the nature of the education programs which must be implemented to remedy the inequities);

Washakie County School District No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) (school finance).

Cf.: *Board of Education Freeport Union Free School District v. Nyquist*, 399 N.Y.S.2d 844 (Sup.Ct., Nassau County, Special Term, 1977) (fees for instructional supplies violates state and federal equal protection; court refers to state constitutional provision concerning education).

But see:

Lujan v. Colorado State Board of Education, _____P.2d _____ (Col. 5/24/82) (school finance suit; education not a fundamental interest under state's equal protection clause);

McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (same, but see below);

Board of Education, Levittown Union Free School District v. Nyquist, ___N.Y.S.2d___ (Ct.App. 6/23/82), *rev'g* 443 N.Y.S.2d 843 (Sup.Ct., App.Div., 2nd Dept., 1981) (same);

Board of Education v. Walter, 390 N.E.2d 813 (Ohio 1979), cert. denied, 444 U.S. 1015 (1980) (same).

Compare:

Levine v. New Jersey Department of Institutions and Agencies, 418 A.2d 239, 242 (N.J. 1980) (while education is a fundamental right, it does not apply to residential care for severely retarded, "subtrainable" children; compare Robinson, below).

Apart from the state's equal protection clause, the STATE'S CONSTITUTIONAL PROVISIONS CONCERNING EDUCATION may themselves create a state constitutional right to education. In such a case, deprivations of that right would be subject to the same level of strict judicial scrutiny independent of equal protection analysis, just as, under the federal constitution, deprivations of First Amendment rights are independently subject to such scrutiny without reference to the Equal Protection Clause. See:

McDaniel v. Thomas, supra (state education clause creates an obligation to provide an adequate education for citizens, but no showing that state finance scheme deprives students of this);

Board of Education v. City of Boston, C.A.No. 47326 (Mass.Super.Ct., Suffolk County, 4/81) (Clearinghouse No. 31,324B) (state constitutional right to adequate education, requiring provision of funds to keep schools open);

Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), cert. denied, 414 U.S. 292 (1974), 355 A.2d 129 (1976), supplemented, 358 A.2d 457 (1976), injunction dissolved, 360 A.2d 400 (1976) (school finance scheme fails to meet state constitutional requirements for "thorough and efficient" education);

Seattle School District No. 1 v. State, 585 P.2d 71 (Wash. 1978) (state's duties under state constitutional education provision create a paramount right to be amply provided with an education; violated by state school finance scheme);

Serrano, supra; and cases cited thereafter.

But see:

Levittown, supra.

Cf. other successful challenges to school fees, based on the state education clause, e.g.:

Paulson v. Minidoka School District No. 331, 463 P.2d 935 (Ida. 1970);

Bond v. Public Schools of Ann Arbor School District, 178 N.W.2d 484 (Mich. 1970);

Concerned Parents v. Caruthersville School District 18, 548 S.W.2d 554 (Mo. 1977);

Granger v. Cascade School District, 499 P.2d 780 (Mont. 1972);

Cardiff v. Bismarck Public School District, 263 N.W.2d 105 (N.Dak. 1978).

Note that the favorable school finance decisions above, such as Serrano and Seattle, all applied strict scrutiny to funding inequalities which resulted in only relative differences in education between districts. It would therefore seem that students in these states facing relative deprivation of their fundamental right to education through non-permanent suspensions are entitled to strict scrutiny standards in state court.

Finally, see In re Distribution of Educational Books and Materials to Underprivileged Students in West Virginia, No. MDL 280 (N.D.W.Va., June 17, 1977) (Clearinghouse No. 22,055H), where the court declared, "Although education is not a fundamental right explicitly guaranteed by the United States Constitution, equal access to education is a right guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where a state has created a right to a free education by its own Constitution and laws." (p. 6) See also Shaffer v. Board of School Directors, 522 F.Supp. 1138, 1143 (W.D. Pa. 1981).

(c) Suspect Classifications

Equal protection cases dealing with what is or is not a suspect classification are discussed in §III, "Discriminatory Rules or Punishment."

Student Discipline Equal Protection Cases

There are relatively few reported equal protection cases dealing with student discipline, but students have had some success in this area, even under the weaker "rational relationship" test. See:

Cases in §VII.A, "Dress and Grooming;"
Cases in §VII.C, "Marriage, Pregnancy, Parenthood."

Cf.: Bradley v. Milliken, 476 F.Supp. 257, 258 (E.D.Mich. 1979) (in declining to approve district's proposed student reassignment plan, court in desegregation suit expressed concern that court-ordered student conduct code had not been applied uniformly, with certain infractions resulting in suspensions or expulsions in some schools and not in others);

Doe v. Plyler, supra* (excluding children of undocumented aliens from public schools struck down on equal protection grounds as irrational; justification based on need to save money rejected);

Handsome v. Rutgers University, 445 F.Supp. 1362 (D.N.J. 1978) (denial of equal protection to withhold student's transcript and deny registration because of failure to repay student loans after she had been declared bankrupt);

Street v. Cobb County School District, 520 F.Supp. 1170 (N.D.Ga. 1981) (violation of equal protection under "rational relationship" test to exclude high school student because she lived with her boyfriend, where school permitted married students to attend);

Castillo v. South Conejos School District, C.A. No. 79-CV-16 (Colo. Dist.Ct. 4/18/79) (violation of equal protection to deny high school student the right to participate in graduation ceremonies because she had, with the board's approval, taken extra courses in order to graduate one year early);

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* aff'd, supra. See discussion below.

Manwell v. Wood, C.A. No. 73-4262-G (D.Mass. 2/9/77) (Clearinghouse No. 17,258B) (where graduate student claimed that termination of financial support and denial of readmission violated due process and equal protection, information as to treatment of similarly situated students was plainly relevant);

Coats v. Cloverdale Unified School District Governing Board, No. 80029 (Cal.Super.Ct., Sonoma County, 1/20/75) (Clearinghouse No. 14,462) (mandamus issued where student was given a failing grade in physical education, thereby preventing his graduation, for refusal to run laps around the gymnasium for being on the losing side of a volleyball game, based on court's finding that the action appeared to be *ultra vires* and/or in violation of substantive due process and/or equal protection);

Cases in §V.E, "School's Failure to Follow Its Own Rules."

See also:

The First Amendment cases referred to above, where unequal treatment has been held illegal under the compelling interest/strict scrutiny higher standard.

Some cases, although based on *ultra vires* or substantive due process, have relied on findings of unequal or discriminatory treatment:

Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D.Tenn. 5/3/79) (Clearinghouse No. 26,964H) (preliminary injunction granted, in part because of inconsistent application of policy concerning suspension of students pending juvenile court proceedings);

McClung v. Board of Education, 46 Ohio St.2d 149, 346 N.E.2d 691 (1976) (refusal to include student in high school yearbook because of failure to meet grooming guidelines held illegal because, in part, guidelines were not applied uniformly in prior years and such uniformity is required);

State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo.App. 1977) (student had missed last eight weeks of junior year following a suspension, with some doubt as to whether the absence was voluntary and uncoerced by principal; at end of senior year, student was denied diploma and required to reenroll for another eight weeks based on policy requiring eight semesters of attendance, despite his having obtained sufficient credits; held unreasonable and discriminatory, in part because the policy was not applied to pregnant students who missed similar amounts of school).

Finally, equal protection cases alleging racial discrimination in discipline are discussed in §III.A.

Equal Protection Standards Under Plyler v. Doe

In Plyler v. Doe, _____ S.Ct. _____, 50 U.S.L.W. 4650 (6/15/82), the Supreme Court held that the children of undocumented aliens could not be excluded from school for failure to pay a tuition charge not applicable to other students. Although the Court cited Rodriguez, supra, and stated that education is not a fundamental right under the federal Equal Protection Clause, in the sense that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population" (4656), it made its strongest statement to date about the importance of the interest in education for equal protection purposes. It then declared that the appropriate standard for determining "rationality" in this case must take into account both the importance of this interest and the fact that the classification involved a status over which the children had little control (see §VII.E, "Conditions Beyond the Student's Control), and that therefore the usual deferential test of "fair relationship to a legitimate public purpose" was insufficient. Instead, the law would not "be considered rational unless it furthers some substantial goal of the State" (4656).

While the Court did not make it entirely clear whether the importance of education which it recognized would alone make this intermediate standard of rationality appropriate for deprivations of education in cases where the second factor (children who are not responsible for the status on which the deprivation is based), the opinion's stress on this factor sould be of some relevance in other contexts. (For further discussion of the intermediate standard, see §III.D, "Wealth Discrimination.")

A portion of this opinion is reprinted on the pages which follow.

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Excerpts from Plyler v. Doe
50 U.S.L.W. 4650 (6/15/82)
(reprinted with permission)

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). But so too, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class,"[14] or that impinge upon the exercise of a "fundamental right."[15] With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.[16] We turn to a consideration of the standard appropriate for the evaluation of §21.031.

A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders.[17] This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.[18] The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[19]

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[14] Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971); see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

[15] In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, *supra*, at 336, even though "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio School District*, 411, U. S., at 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights. See *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 667 (1966); *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

[16] See *Craig* v. *Boren*, 429 U. S. 190 (1976); *Lalli* v. *Lalli*, 439 U. S. 259 (1978). This technique of "intermediate" scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles. "In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'" *University of California Regents* v. *Bakke*, 438 U. S. 265, 299 (1978) (Opinion of POWELL, J.), quoting A. Cox, The Role of the Supreme Court in American Government 114 (1976). Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice.

[17] The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several presidential proposals for reform of the immigration laws—including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws—the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the nation, and that they are unlikely to be displaced from our territory:

"We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals." Testimony of William French Smith, Attorney General, Before Senate Subcommittee on Immigration and Refugee Policy and House Subcommittee on Immigration, Refugees and Int'l Law (July 30, 1981).

[18] As the District Court observed in No. 80-1538, the confluence of government policies has resulted in

"the existance of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them." 458 F. Supp., at 585.

[19] We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, see *e. g.*, n. 14 *supra*, has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrele-

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its benificence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

> "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972) (footnote omitted).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.

Public education is not a "right" granted to individuals by the Constitution. *San Antonio School District*, *supra*, at 35. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and the acquisition of knowledge as matters of supreme importance." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923). We have recognized "the public school as a most vital civic institution for the preservation of a democratic system of government," *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). As noted early in our history, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin* v. *Yoder*, 406 U. S. 205, 221 (1972). And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." *Ambach* v. *Norwick*, *supra*, at 77. C In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin* v. *Yoder*, *supra*, at 221. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[*] What we said 28 years ago in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), still holds true:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Id., at 493.

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vancy." With respect to the actions of the federal government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See *DeCanas* v. *Bica*, 424 U. S. 351 (1976).

[*] Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. Whatever the current status of these children, the courts below concluded that many will remain here permanently and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participation in core political institutions. "[T]he benefits of education are not reserved to those whose productive utilization of them is a certainty . . . ." 458 F. Supp., at 581, n. 14. In addition, although a noncitizen "may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community." *Nyquist* v. *Mauclet*, 432 U. S. 1, 12 (1977). Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.

B

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. See *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28–39 (1973). But more is involved in this case than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

D. TORT ACTIONS (ASSAULT AND BATTERY, NEGLIGENCE, ETC.)

A "tort" action is a private, civil law suit in which a person claims that someone else has a legal duty towards him/her, has breached that duty, and, as a result, has harmed him/her. It does not include actions based on contract. School officials who use excessive, cruel, or unreasonable methods of discipline may be subject to damage suits for such torts as assault and battery, negligence, invasion of privacy, libel, intentional infliction of mental distress, or other state law causes of action.

The analysis here has some relationship to the ultra vires analysis in §VI.A. It is precisely in those situations in which school officials' actions are not within their reasonable, legitimate authority that those officials may be liable in a tort action. For example, in states which give school officials the authority to impose "reasonable" corporal punishment, this authority gives school officials a defense against suits for assault and battery, but school officials who exceed this "reasonable" limit can be found liable for assault and battery. See, e.g.:

Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944) (principal's kneeling on student's stomach);
Frank v. New Orleans Parish School Board, 195 So.2d 451 (La.Ct.App. 1967) (physical education teacher's lifting, shaking, and dropping student);
Hogenson v. Williams, 542 S.W.2d 456 (Tex.Ct.Civ.App. 1976) (football coach's striking student bacause of displeasure with student's performance).

School cases involving negligence -- which, unlike assault and battery, is unintentional damage, caused by failing to exercise the legally required degree of reasonable care towards another person -- usually have dealt with such things as school bus accidents, gym class accidents, and allegations of inadequate supervision. These cases, which are beyond the scope of this manual, are summarized in 78 Corpus Juris Secundum §§320-322. As that volume notes, however, in some states school districts are immune from liability for torts, and in those states, the only state law recourse may be suits against school personnel in their private capacity.

For an example of a fraud case, see Dizick v. Umpqua Community College, 599 P.2d 444 (Ore. 1979), upholding a jury award of $12,500 to a student where the school fraudulently represented that certain welding courses would be offered.

The attempt to use tort concepts such as negligence or fraud in "educational malpractice" cases -- where the student alleges a failure to properly educate him/her -- have generally been unsuccessful, at least outside of violations of specific statutory requirements, such as special education laws. See for example:

Peter Doe v. San Francisco Unified School District, 131 Cal.Rptr. 854 (Ct.App., 1st Dist., 1976);
Donohue v. Copaigue Union Free School District, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (N.Y.Ct.App. 1979).

But see:
Pope v. Crawford Central School District, No. 60, September Term, 1979 (Pa.Comm.Pleas, Crawford County, 7/25/80) (Clearinghouse No. 29,903B) (refusing to dismiss educational malpractice complaint).

But cf.:
Joyner v. Albert Merrill School, 411 N.Y.S.2d 988 (Civ.Ct., New York City, 1978) (damages awarded to student whom school fraudulently induced to enroll knowing that he was unqualified to absorb or use their computor training program and who, when he repeatedly told the school that he did not understand the materials and wished to quit and obtain a refund, was reassured that he would obtain a good job at end of program).

See also:
John Elson, "A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching," 73 Nw.U.L.Rev. 641 (1978).

These rulings, however, have been based on the courts' unwillingness to make broad judgments about proper educational standards, and thus they are not applicable to disciplinary cases. The rulings should be contrasted, for example, to decisions in cases dealing with accidental physical injuries on school grounds, where most courts have been quite comfortable applying traditional tort principles, such as negligence.

For decisions based on various torts, see:

§VIII.B, "Corporal Punishment and Similar Abuses;"
§I.A.1.b, "Defamation" (libel and slander);
§I.A.1.c, "Invasion of Privacy;"
§IV, "Right to Privacy;"
§VIII.K, "Behavior-Modifying Drugs."

E. CONTRACT

It can be argued that the relationship between the student and the school is contractual in part, and that the school cannot take action which breaches the student's contractual rights. The contractual terms involved may be explicit, such as statements in published catalogues, regulations, etc., in effect at the time student enters. The terms may also be implicit, as when it is argued that, so long as the student meets his/her contractual obligations, the school has an obligation not to exclude him/her, or that there is an implicit contractual obligation to afford the student basic fairness in areas such as discipline.

Where the student is attempting to rely on explicit regulations or other statements by the school, the issues are most similar to those discussed in §V.E., "School's Failure to Follow Its Own Rules." Contractual claims relying on implicit terms of fair treatment, etc., on the other hand, are more parallel to the substantive due process claims discussed in §VI.B.

Contract law has been most often invoked and applied in private school cases, where the student may not have the same constitutional rights which apply against public institutions. Nevertheless, as indicated by the cases below, courts have found that a contractual relationship exists between students and public universities. There has been little case law, however, addressing the issue of whether a contract exists between an elementary or secondary public school and its students or their parents.

At the post-secondary level, most courts have viewed the relationship as contractual, while not always agreeing with the student's interpretation of the terms of that contract:

Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975) (while some elements of contract law apply to private universities, there was here no contract governing disciplinary proceedings);

Williams v. Howard University, 528 F.2d 658 (D.C.Cir. 1976) (arbitrary, bad faith denial of readmission might be breach of contract, but no evidence of such here);

Mahavongsanon v. Hall, 529 F.2d 448 (5th Cir. 1976) (no breach of contract; student was not denied due process; new academic requirement enacted after student entered was reasonable);

Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977), cert. denied, 435 U.S. 971 (1978) (while contract law governs, some flexibility is required; standard is that of "reasonable expectation;" no basis for reasonable expectation that "recommendation" of a grade appeals committee, as stated in college's information booklet, would be treated as a decision rather than a recommendation);

Sanford v. Howard University, 415 F.Supp. 23 (D.D.C. 1976) (guarantee against racial discrimination in grading, assignment, and educational progress is an implicit term of contract, but no evidence of discrimination here);

Wisch v. Sanford School, Inc., 420 F.Supp. 1310 (D.Del. 1976) (relationship is contractual, but even if it implies procedural fairness, no denial of such fairness here);

Giles v. Howard University, 428 F.Supp. 603 (D.D.C. 1977) (where college policy provided that University reserved right to dismiss a student who failed a class and did not remove the deficiency, such policy would also be read to imply that the University reserved the right to require such a student to comply with any reasonable condition to avoid such dismissal);

Jansen v. Emory University, 440 F.Supp. 1060 (N.D.Ga. 1977), aff'd, 579 F.2d 45 (5th Cir. 1978) (where dismissal was for academic reasons, college bulletin stating that "no student will be dismissed without due process" obligated the college only to provide those procedures which were set out in the bulletin);

Ross v. Pennsylvania State University, 445 F.Supp. 147 (M.D.Pa. 1978) (relationship between student and university is contractual, both for private and for public institutions; student had reasonable expectation, based on statements of policy by Penn State and the experience of former students, that he would receive degree if he performed work satisfactorily and paid fees; this created a property interest entitling him to due process);

Watson v. University of South Alabama College of Medicine, 463 F.Supp. 720 (S.D.Ala. 1979) (assuming that there was a contractual relationship, court rejected student's interpretation of the college bulletin as to what constituted a passing grade-point average);

Peretti v. State of Montana, 464 F.Supp. 784 (D.Mon. 1979)(closing of technology program violated implied contractual obligation, which was in turn a denial of due process);

Swanson v. Wesley College, Inc., 402 A.2d 401 (Del.Super. 1979) (relationship is contractual, requires basic procedural fairness in disciplinary proceedings, and includes the terms of the college bulletin and student handbook; here the college acted reasonably and in strict compliance with its written procedures);

Basch v. George Washington University, 370 A.2d 1364 (D.C.Ct.App. 1977) (school bulletin which contained "estimated" tuition increases and stated that such projections were uncertain and might be readjusted did not create an enforceable promise to maintain tution costs within those estimates);

Pride v. Howard University, 46 U.S.L.W. 2497, Appeal No. 11234 (D.C.Ct.App., Mar. 9, 1978) (although university's code of conduct constitutes a contract, this contract was not breached by absence of two student members of hearing panel, which consisted of four student and four faculty members, particularly where this was consistent with past practice of not replacing panel members who had graduated until the fall term);

Levine v. George Washington University School of Medicine & Health Sciences, Civil No. 8230-76 (D.C.Super.Ct., Sept. 7, 1976) (academic expulsion held a violation of contract where student relied upon terms -- that his work would not be of "marginal quality" -- which were then subjectively interpreted by the school to his detriment);

DeMarco v. University of Health Sciences/Chicago Medical School, 352 N.E.2d 356 (Ill.App.Ct., 1st Dist., 4th Div., 1976) (former student should be issued degree where he met the basic requirements for the degree; extra requirements to which student agreed after he was first denied the degree were arbitrary and unreasonable);

Steinberg v. Chicago Medical School, 371 N.E.2d 634 (Ill. 1977) (school's acceptance of application fee created contract which bound school to follow the academic selection factors for admissions listed in its bulletin);

Tanner v. Board of Trustees of University of Illinois, 363 N.E.2d 208 (Ill.App. 1977) (reversing dismissal of action for breach of implied contract; university cannot arbitrarily and capriciously refuse to award degree to student who fulfills degree requirements);

Abrams v. Illinois College of Podiatric Medicine, 395 N.E.2d 1061 (Ill.App. 1979) (in academic dismissal case, oral statements and clauses of student handbook on which student attempted to rely, such as, "It is desirable that the instructor . . .," were deemed too vague and indefinite to create an enforceable expectation);

Hill v. North Central Area Vocational School, 310 So.2d 104 (La. 1975) (allegation that school arbitrarily refused to allow nursing students to continue their training after accepting tuition stated a cause of action in contract);

Abbariao v. Hamline University School of Law, 258 N.W.2d 108 (Minn. 1977) (school's failure to provide tutorial seminars as outlined in school bulletin of Midwestern School of Law, which student entered before it became affiliated with Hamline, held not a breach of contract, but student would be allowed to substantiate claim that his dismissal was arbitrary and capricious);

Abrams v. New School for Social Research, 390 N.Y.S.2d 818, 40 N.Y.2d 961, 359 N.E.2d 329 (N.Y.Ct.App. 1976) (school followed the procedures it had agreed to in dismissing doctoral candidate);

Olsson v. Board of Higher Education, 426 N.Y.S.2d 248, 49 N.Y.2d 408, 402 N.E.2d 1150 (N.Y.Ct.App. 1980) (where student's failure on comprehensive exam was caused in part by his reliance on professor's mistaken statement, college's contractual obligation to act in good faith was met by offering a retest, since student had not yet demonstrated that he possessed the academic competence to earn a master's degree);

Tedeschi v. Wagner College, 427 N.Y.S.2d 760, 49 N.Y.2d, 652 (N.Y.Ct.App. 1980) (university obligated to follow its own guidelines concerning suspension or expulsion procedures for non-academic dismissal where dismissal was at least in part for reasons of conduct; failure to utilize the required student-faculty review board not justified by the presence of other procedures);

Eden v. Board of Directors of State University, 374 N.Y.S.2d 686 (S.Ct., App.Div., 1975) (public university; contract was created by new medical school when it accepted students for enrollment and stated there were no barriers to entrance; school breached this contract when it then failed to open);

Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973 (Sup.Ct., Tompkins County, 1975) (where contract standard applies, as in private schools, "it is imperative that the college or university's decision to discipline the student be predicated on procedures which are fair and reasonable and which lend themselves to a reliable determination" (977); college violated its own rules when it failed to allow student and his representative to appear before appeal board following the first level hearing);

Miller v. Long Island University, 380 N.Y.S. 2d 917 (Sup.Ct., Kings County, 1976) (basic relationship is contractual; lack of hearing did not violate contract);

King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505 (Civ.Ct., New York City, Kings County, 1980) (where student was expelled for being "too much of an 'exhibitionist,'" court held that clause which stated that students who "leave" for any reason are not entitled to tuition refunds did not apply to expulsions; if a contract clause did permit the school to retain tuition of students unjustly expelled, it would be stricken as "unconscionable in the substantive sense in light of the agreement's one sidedness, the absolute discretion it purports to give the Academy, and the fact that a hearing was not necessary prior to the dismissal;" the college has an implied contractual right to retain the tuition if an expulsion is for just cause; here the student's conduct was held not serious enough to constitute just cause; school ordered to return tuition);

Dews v. Brunner, Summons 44178 (N.Dak.Dist.Ct., 5th Jud.Dist., Ward Cty., 4/27/78) (expulsion from hairstyling school upheld based on student's violation of contractual obligation to abide by school's rules and regulations and attend all classes);

Behrend v. State, 379 N.E.2d 617 (Ohio Ct.App. 1977) (relationship between students and Ohio University contractual; students entitled to bring damage action based on individual determination of loss suffered by each as a result of school of architecture's losing its accreditation);

Lowenthal v. Vanderbilt University, No. A-8525 (Tenn.Chancery Ct., Davidson County, Memorandum, Aug. 15, 1977, Order, Aug. 29, 1977) (Clearinghouse No. 22,686A,B) (university, having accepted doctoral students into a program, had contractual obligation to provide the resources necessary to provide high quality academic training resulting in an academically respectable doctoral degree which may be earned upon satisfaction of reasonable, consistent standards and procedures; collapse of program in this case breached that obligation).

In dealing with contract claims, one is sometimes faced with very broad clauses written in by the school which give it the right, e.g., to dismiss any student at any time for any reason. Such clauses can be attacked using traditional contract law principles under which certain clauses are regarded as unenforceable -- either because they are unconscionable or unreasonable, and therefore contrary to public policy, or because they are the result of "adhesion" contracts, in which the bargaining power of the two parties are too unequal. King v. American Academy of Dramatic Arts, supra, is one of the few school cases to recognize and address this issue. See also:

Note, Private Government on the Campus -- Judicial Review of Student Expulsions, 72 Yale L.J. 1362 (1963);

In re Blackman v. Brown, 419 N.Y.S.2d 796 (Sup.Ct. Ulster County, 1978) (commitment made by student and parent not to skip any more classes could not be relied upon as a contract to enforce rule removing student from class since rule is contrary to public policy as embodied in compulsory attendance law).

Cf.: Joyner v. Albert Merrill School, 411 N.Y.S.2d 988 (Civ.Ct., New York City, 1978) (school fraudulently induced student to sign a contract, knowing that he was unqualified to benefit from their computer program).

VII. CHALLENGING SPECIFIC TYPES OF RULES

A. DRESS AND GROOMING

Legal Theories

Both federal and state courts are divided concerning the extent to which schools may regulate student dress and hair styles. The legal analysis begins with determining whether such regulation impinges upon students' constitutional rights. First Amendment rights of free expression (personal appearance as an expression of one's personality, lifestyle, etc.); substantive rights protected as a liberty under the Due Process Clause (choice of appearance an aspect of personal integrity and part of the range of conduct which the Constitution leaves up to individuals); equal protection theories (different rules applied to males and females or to students and other citizens); and rights of privacy under the First, Fifth, Ninth, and Fourteenth Amendments (individual freedom to regulate personal life in areas which do not harm others) have been advanced at various times in support of constitutional rights in this area.

Where courts find that such rights are at stake, then the school has the burden, at a minimum, of showing that its legitimate interests in the regulation outweigh the infringement of the students' rights (and, in some jurisdictions, may also have to demonstrate that those school interests cannot be served by less restrictive means). Where courts do not find that constitutional rights to choose one's own appearance are at stake, students generally cannot prevail unless they demonstrate that the regulation is arbitrary and/or has no reasonable relationship to any legitimate, authorized school function, on substantive due process or *ultra vires* grounds. (See §§VI.A and B.)

The decisions which have held that there is no constitutional right at stake, however, may not be very significant at present. As discussed below, federal regulations concerning sex discrimination in education now prohibit many of the most common forms of appearance rules. (See below on current status).

Circuits Which Recognize an Interest

Federal Courts have held that students do have a constitutionally recognizable interest (usually as a liberty interest under the Due Process Clause) in the way they wear their hair in:

THE FIRST CIRCUIT:
    Richards v. Thurston, 424 F.2d 1281 (1970).

THE THIRD CIRCUIT:
    Zeller v. *Donegal*, 517 F.2d 600 (1975)(*en banc*);
    Syrek v. Pennsylvania, 537 F.2d 66 (1976).

THE FOURTH CIRCUIT:
Massie v. Henry, 455 F.2d 779 (1972);
Long v. Zopp, 476 F.2d 180 (1973);
Mick v. Sullivan, 476 F.2d 973 (1973).

THE SEVENTH CIRCUIT:
Crews v. Clonc, 432 F.2d 1259 (1970);
Arnold v. Carpenter, 459 F.2d 939 (1972);
Breen v. Kahl, 419 F.2d 1034 (1969), cert. denied, 398 U.S. 937 (1970);
Holsapple v. Woods, 500 F.2d 49, cert. denied, 419 U.S. 901 (1974).

THE EIGHTH CIRCUIT:
Bishop v. Colaw, 450 F.2d 1069 (1971);
Torvik v. Decorah Community Schools, 453 F.2d 779 (1972).

and in several state courts within the NINTH CIRCUIT (see below). The Court of Appeals for the SECOND CIRCUIT has not ruled on a student hair case, but lower and state courts within the circuit have held for the student:
Crossen v. Fatsi, 309 F.Supp. 114 (D.Conn. 1970);
Dunham v. Pulsifer, 312 F.Supp. 411 (D.Vt. 1970);
Yoo v. Moynihan, 28 Conn.Supp. 375, 262 A.2d 814 (Super.Ct. 1969);
In re Vartuli, 10 Ed.Dept.Rep. 241 (N.Y.Ed.Comm'r 1971).

Circuits which Do Not Recognize an Interest

Federal circuits have held that students do not have a constitutionally recognizable interest in the way they wear their hair in:

THE FIFTH CIRCUIT:
Karr v. Schmidt, 460 F.2d 609 (en banc), cert. denied, 409 U.S. 989 (1972).
See: Ferrara v. Hendry County School Board, 362 So.2d 371 (Fla.Ct. App. 1978) (rule requiring students to shave upheld as reasonable).
BUT SEE:
Lansdale v. Tyler Junior College, 470 F.2d 659 (1972) (en banc) (Karr limited to high school and below; hair regulations invalid for college students in absence of unusual conditions).

THE SIXTH CIRCUIT:
Gfell v. Rickelman, 441 F.2d 444 (1971);
Jackson v. Dorrier, 424 F.2d 213, cert. denied, 400 U.S. 850 (1970).
See also:
Royer v. Board of Education, 365 N.E.2d 889 (Ohio Ct.App. 1977) (sufficient evidence that hair length rules were necessary to promote discipline).

BUT SEE:

Cordova v. Chonko, 315 F.Supp. 953 (N.D.Ohio 1970) (where school board gave principal authority only to regulate clothing and cleanliness, and student's hair length did not disrupt or distract, principal's suspension of student for hair length was unreasonable and deprived student of due process and fair treatment);

McClung v. Board of Education, 346 N.E.2d 691 (Ohio Sup.Ct. 1976) (refusal to include student's picture in yearbook because of violation of hair length rule overturned because "unnecessary for the government of pupils," because the rule did not specify punishment, and because the rule was not evenly applied);

Jacobs v. Benedict, 39 Ohio App. 141, 316 N.E.2d 898 (1973).

THE NINTH CIRCUIT:

King v. Saddleback Junior College District, 445 F.2d 932, cert. denied, 404 U.S. 979 (1971).

BUT SEE:

Breese v. Smith, 501 P.2d 159 (Alaska 1972);

Komadina v. Peckham, 13 Arizona App. 498, 478 P.2d 113 (1970);

Alexander v. Thompson, 313 F.Supp. 1389 (C.D.Cal. 1970) (state legislature has not authorized school districts to regulate dress and appearance; see §VI.A for discussion);

Meyers v. Arcata Union High School District, 269 Cal.App.2d 549, 75 Cal.Rptr. 89 (Ct.App. 1969);

Murphy v. Pocatello School District, 94 Idaho 32, 480 P.2d 878 (1971);

Neuhaus v. Federico, 12 Or.App. 314, 505 P.2d 939 (1973).

THE TENTH CIRCUIT:

Freeman v. Flake, 448 F.2d 258 (1971), cert. denied, 405 U.S. 1032 (1972);

New Rider v. Board of Education, 480 F.2d 693, cert. denied, 414 U.S. 1097 (1973);

Hatch v. Goerke, 502 F.2d 1189 (1974).

BUT SEE:

Independent School District No. 8 v. Swanson, 533 P.2d 496 (Okla.Sup.Ct. 1976) (hair rule struck down as ultra vires because, although there is no constitutional right to control hair length, student may not be excluded except for a reasonable and necessary purpose; hair rule not reasonably related to function of the school).

Dress Cases

Dress cases have been fewer, but students have generally prevailed (probably because most have been brought in jurisdictions above which recognize a protected interest):

Alexander v. Thompson, supra;

Bannister v. Paradis, 316 F.Supp. 185 (D.N.H. 1970) (blanket rule against dungarees invalid);

Wallace v. Ford, 346 F.Supp. 156 (E.D.Ark. 1972) (many clauses in an elaborate dress code invalid, a few upheld);
Scott v. Board of Education, 61 Misc.2d 333, 305 N.Y.S.2d 601 (1969) (rule prohibiting slacks for female students invalid);
Dunkerson v. Russell, 502 S.W.2d 64 (Ky. 1973) (rule against jeans for female students upheld);
Johnson v. Joint School District No. 60, 508 P.2d 547 (Ida. 1973) (rule requiring skirts of a minimum length invalid);
In re Dalrymple, 5 Ed.Dept.Rep. 113 (N.Y.Ed.Comm'r 1966) (rule prohibiting slacks for female students invalid);
In re McQuade, 6 Ed.Dept.Rep. 37 (N.Y.Ed.Comm'r 1966) (rule prohibiting boots for boys invalid);
In re Johnson and Watkins, 9 Ed.Dept.Rep. 14 (N.Y.Ed.Comm'r 1969) (dress rules invalid unless they relate to a specific valid educational purpose, such as health, safety or full participation in school activities);
Matter of Scally, 16 Ed.Dept.Rep. 243 (N.Y.Ed.Comm'r 1976) (similar approach where student wore cut-off shorts in gym class).

But Cf:

Fowler v. Williamson, 448 F.Supp. 497 (W.D.N.C. 1978) (rejecting student's due process challenge to his exclusion from graduation ceremony for wearing jeans in violation of graduation dress rules; court held there was no due process interest in participating in the ceremony and did not address the issue of whether dress is a protected interest; compare Massie v. Henry, supra, where the Fourth Circuit held that student's hair length is part of the due process "right to be secure in one's person").

Student-Adopted Dress/Grooming Codes

Dress codes and hair regulations which are invalid do not become valid simply because they have been approved by a majority of the student body.

Arnold v. Carpenter, supra;
Bishop v. Colaw, supra;
Scott v. Board of Education, supra;
In re Cossey, 9 Ed.Dept.Rep. 11 (N.Y.Ed.Comm'r 1969).

Sex Discrimination and Dress/Grooming Codes

Related to equal protection theories concerning personal appearance is Title IX of the 1972 Education Amendments (20 U.S.C. Sec. 1681), which bans sex discrimination in educational institutions receiving federal funds. 34 C.F.R. Sec. 106.31 of the accompanying Department of Education regulations declares:

(b) . . . in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . .

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance; . . .

Compare:

Trent v. Parritt, 391 F.Supp. 171 (S.D.Miss. 1975) (male hair rule not in violation of Title IX; decision made before HEW regulations became effective);

Mercer v. Board of Trustees, 44 U.S.L.W. 2573 (Tex.Ct.Civ.App., 14th Sup.Jud.Dist., June 2, 1976) (male hair length rule not in violation of Texas Equal Rights Amendment).

Title IX would seem to strike down the vast majority of hair and dress codes, which generally use separate rules for males and females. (Section 86.31(b)(5) is in jeopardy of being repealed by the current administration. In such an event, however, a challenge might still be possible under the statute itself.)

Racial Discrimination and Dress/Grooming Codes

Certain dress or grooming rules which cannot be justified in terms of health or safety sometimes impact more heavily on minority students because of cultural differences -- such as rules prohibiting hats or forbidding Afros. For discussion of legal standards applicable to such rules, see §III.A, "Race and National Origin Discrimination."

Dress/Grooming Rules for Government Employees

The Supreme Court has upheld hair regulations for police officers. Kelly v. Johnson, 425 U.S. 238 (1976). The holding, however, was explicitly based upon the county's needs for an organizational structure for its police force, and the court noted that it was not addressing the extent of any liberty interest in personal appearance for other citizens. This distinction has been recognized in other decisions.

Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975);

Independent School District No. 8 v. Swanson, supra, 553 P.2d at 500 n.3 ("it does not resolve any issues presented here as Kelly concerned only appearance restrictions on government employees").

See: East Hartford Education Assn. v. Board of Education, 562 F.2d 838 (2nd Cir. 1977) (en banc) (upholding teacher dress code, relying on Kelly).

Dress Grooming and Symbolic Expression

Regardless of whether the courts in a particular jurisdiction view dress or hair length as constitutionally protected, it is clear that students do have a constitutional right to wear buttons, badges, armbands, and other symbols of expression, subject to the normal limitations of the First Amendment. See §I.B.2 on symbolic expression. The line between such symbolic expression and general appearance may not always be clear where hair style or items of clothing -- as distinguished from armbands or buttons -- are adopted to express belief or viewpoint. See:

PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975) (Clearinghouse No. 17,507), *rev'd in part on other grounds sub nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 98 S.Ct. 1042 (1978) (reversed on damages issue) (where student was suspended for refusing to remove earring, which he asserted was a symbol of black pride, court held that "the First Amendment implication of the . . . case also warrants stricter procedural safeguards" than would normally apply to a short suspension).

Compare:

New Rider v. Board of Education, *supra* (where a hair regulation was challenged by Pawnee Indian students who wore braids as part of cultural heritage, the rule was upheld on the grounds that it was needed for "instilling pride"!);

East Hartford Education Assn. v. Board of Education, *supra* (teacher's asserted First Amendment claim that not wearing tie was symbolic expression of his views was too weak to outweigh school's interest in regulating employee appearance under *Kelly*, *supra*).

B. OUTSIDE ACTIVITIES

Under the ultra vires doctrine discussed in §VI.A, schools can only do that which the legislature has authorized them to do, and any school rules must be related to carrying out those functions which the legislature has authorized. Courts thus will generally hold that any regulation of off-campus conduct is impermissable unless it can be demonstrated that the regulation is essential for carrying out some legitimate school function on-campus or at school-sponsored events. (A similar result can be reached on substantive due process grounds See §VI.B.) Courts have struck down off-campus regulation in:

Shanley v. Northeast Independent School District, 462 F.2d 960, 974-975 (5th Cir. 1972) ("It should have come as a shock to the parents . . . that their elected school board had assumed suzereinty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts;" off-campus literature distribution not within the school's reach here);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340, 1345 n.1 (S.D.Tex. 1969) (similar holding);
Murphy v. Board of Directors, 30 Ia. 429 (1880) (similar holding);
Board of Directors v. Green, 259 Ia. 1260, 147 N.W.2d 854, 858 (1967) (dicta);
Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555 (Ia. 1972) (student found in presence of beer off-campus);
Howard v. Clark, 299 N.Y.S.2d 65, 59 Misc.2d 327 (1969) (criminal charges of off-campus heroin possession);
Gentry v. Memphis Federation of Musicians, Local No. 71, 177 Tenn. 566, 151 S.W.2d 1081 (1941) (prohibition on student bands playing outside of school-related events);
Taylor v. Grisham, C.A. No. A-75-CA-13 (W.D.Tex., Feb. 24, 1975) (Clearinghouse No. 14,925) (off-campus possession of marijuana).
Cf.: Hoyem v. Manhattan Beach City School District, 139 Cal.Rptr. 769 (Ct.App. 1977) ("a school district has no duty to supervise or provide for the protection of pupils between home and school unless it has undertaken to provide transportation");
Oglesby v. Seminole County Board of Public Instruction, 328 So.2d 515 (Fla.Ct.App., 4th Dist., 1976) (school board not liable for injury inflicted on student on the way home from school by another student who had been suspended);
Walters v. State Board of Education, 1977 N.J.Sch.L.Dec. 854 (N.J.Ed. Comm'r. 1977) (school boards have no authority to provide for safety of children in reaching school; such responsibility belongs to municipal authorities).

But see:

Krasnow v. Virginia Polytechnic Institute and State Univeristy, 551 F.2d 591 (4th Cir. 1977) (university can determine that illegal possession of drugs, both on- and off-campus, is detrimental to university);

Fenton v. Stear, 423 F.Supp. 676 (W.D.Pa. 1976) (upholding punishment of student for using "fighting words" to teacher outside of school);

Braesch v. DePasquale, 265 N.W.2d 842 (Neb. 1978) (upholding exclusion from interscholastic athletics for violating rules prohibiting team members from drinking or using drugs);

McLean Independent School District v. Andrews, 333 S.W.2d 886 (Tex. Civ.App. 1960) (regulation of student driving car to school upheld).

But cf.:

Commonwealth v. Holderman, 425 A.2d 725 (Pa.Super. 1981) (state statutes held to permit campus police to pursue off-campus and arrest for drunken driving student whom they observed commit illegal turn on campus).

Compare:

Abremski v. Southeastern School District Board of Directors, 421 A.2d 485 (Pa.Comm. 1980) (upholding regulation of conduct on school bus).

Under this general view, restrictions on students' social activities have been found ultra vires:

Dritt v. Snodgress, 66 Mo. 286, 27 Am.R. 343 (1877) (dicta);
State v. Osborne, 32 Mo.App. 536 (1888);
Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909).

But see:

Mangum v. Keith, 147 Ga. 605, 95 S.E. 1 (1918) (such restrictions permissable where limited to that necessary to assure performance of studies);

Texas High School Gymnastics Association v. Andrews, 532 S.W.2d 142 (Tex.Civ.App. 1976) (upholding rule against team members' practicing with or taking lessons from a private club);

Cases upholding athletic eligibility rules which limit outside athletic competition, listed under "Membership Rules" in §I.B.6, "Freedom of Association."

Another related line of cases have found that regulation of students' personal lives is beyond the scope of school's authority. See, for example, the cases involving marriage, pregnancy, and motherhood cited in §VII.C.

Cf. McClung v. Board of Education, 346 N.E.2d 691 (Ohio 1976) (school failed to demonstrate that any valid educational purposes were served by grooming guidelines governing pictures in student yearbook, particularly where yearbook was distributed after graduation).

On the other hand some courts have held that certain college rules concerning dormitories serve a valid educational or institutional purpose.

> Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974) (requiring single freshman and sophmores to live in dormitories);
>
> Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975) (barring children of married students from housing not designed for children);
>
> Futrell v. Ahrens, 540 P.2d 214 (N.M. 1975) (barring opposite sex from dorm bedrooms where students not required to live in the dormitories).

For further discussion, see: Center for Law and Education, The Constitutional Rights of Students, 11-12 (1976). See also: cases concerning fraternities, sororities, etc., discussed in the membership portion of §I.B.6, "Association -- Student Organizations."

While some of the case law seems to allow regulation of off-campus activity where related in some way to the school's function, the line is a difficult one to draw and should best be avoided. Virtually any aspect of a student's outside life can in one way or another be related to his/her functioning in school, allowing the dangerous possibility of the school's attempting to regulate home activities-- from friendships, television viewing, and diet, to child-rearing patterns and use of family income. From this viewpoint, any regulation of student conduct outside of school-sponsored activities whatsoever should be prohibited.

Such an approach raises questions about athletic training rules. Compare Bunger, supra with Braesch, supra. Under the approach suggested here, students should not be punished (including restrictions on extracurricular participation) for failing to comply with orders or regulations concerning home diet, sleep, etc. Instead, students could be restricted solely for failing to meet actual on-campus performance requirements at the school-sponsored activity itself, where reasonably related to the activity -- for instance, a requirement that a student be in a certain weight class for wrestling (rather than a home diet requirement) or a system of selecting students for play on the basis of ability to perform, so that students who are not sufficiently alert or in good shape will find themselves benched (rather than requiring students to get a certain amount of sleep). Coaches could then issue training recommendations (concerning sleep, diet, etc.) as the recommended way of getting into the physical shape needed to meet the performance requirements.

C. MARRIAGE, PARENTHOOD, PREGNANCY

Federal Title IX Regulations

Federal regulations issued by the Department of Education to implement Title IX of the 1972 Education Amendments (20 U.S.C. §1681) now provide substantial protection for students who are married, pregnant, or parents. 34 C.F.R. §106.40 of the regulations, which apply to all educational institutions receiving federal funds, states:

> Marital or Parental Status
>
> "(a) Status generally. A recipient [of federal financial assistance] shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.
>
> "(b) Pregnancy and related conditions. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.
>
> "(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students of other physical or emotional conditions requiring the attention of a physician.
>
> "(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.
>
> "(4) A recipient shall treat pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.
>
> "(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began."

Court Cases

Court cases both prior to and subsequent to the Title IX regulations have consistently upheld (under substantive due process, equal protection, or *ultra vires* doctrines -- see §VI) the rights of students who are married, pregnant or parents to full participation in all school activities.

Marriage

Courts consistently hold that students' rights to participate in school activities cannot be restricted because of marriage.

Holt v. Shelton, 341 F.Supp. 821 (M.D.Tenn. 1972) (exclusion from extracurricular activities unconstitutional);

Davis v. Meek, 344 F.Supp. 298 (N.D. Ohio 1972) (same);

Moran v. School District #7, Yellowstone County, 350 F.Supp. 1180 (D.Mont. 1972) (preliminary injunction against barring married student from football team);

Romans v. Crenshaw, 354 F.Supp. 868 (S.D.Tex. 1972) (exclusion from non-athletic extracurricular activities unconstitutional);

Hollon v. Mathis Independent School District, 358 F.Supp. 1269 (S.D.Tex. 1973), *vacated for mootness*, 491 F.2d 92 (5th Cir. 1974) (temporary restraining order against exclusion from interscholastic athletics);

O'Neill v. Dent, 364 F.Supp. 565 (E.D.N.Y. 1973) (exclusion from maritime academy unconstitutional);

Regina J. v. English, *infra*;

Hill v. Johnson, C.A. No. 77-51-MAC (M.D.Ga., Sept. 14, 1977) (Clearinghouse No. 22,612A,B) (requiring students who are married, pregnant, or parents to attend a separate school with more limited facilities, course offerings, and teachers held unconstitutional);

Stone v. School Board of Calhoun County, C.A. No. MCA-78-0251 (N.D.Fla., Consent Judgment, 12/8/78) (Clearinghouse No. 25,214D) (policy of excluding married or pregnant students and female students with children out of wedlock from regular high school program, although permitting them to attend evening adult program with more limited curriculem, violates Fourteenth Amendment and Florida statute);

Beeson v. Kiowa County School District RE-1, 567 P.2d 801 (Colo.Ct. App. 1977) (exclusion of married students from extracurricular activities unconstitutional);

Indiana High School Athletic Association v. Raike, 329 N.E.2d 66 (Ind.Ct.App. 1975) (same).

Cf.: *Street v. Cobb County School District*, 520 F.Supp. 1170 (N.D.Ga. 1981) (denial of equal protection to expel high school student for living with boyfriend when school permitted married students and pregnant students to attend).

Parenthood

Recent case law makes it clear that students may not be restricted in their participation in school activities because they are parents.

Perry v. Grenada Minicipal Separate School District, 300 F.Supp. 748 (N.D.Miss. 1969) (exclusion of unwed mothers from school unconstitutional);

Shull v. Columbus Municipal Separate School District, 338 F.Supp. 1376 (N.D.Miss. 1972) (same);

Farley v. Reinhart, C.A. No. 15569 (N.D.Ga., Jan. 10, 1972) (exclusion of unwed mothers from day school unconstitutional);

Regina J. v. English, C.A. No. 75-616 (D.S.C., consent decree, Aug. 1, 1975) (school district agrees that exclusion of unwed mother from from regular high school program violates due process and equal protection clauses, Title IX, and state constitution; students who are married, pregnant, or parents are to be admitted to school without restriction and with the same rights and responsibilities as all other students; school is to remove reference to pregnancy or unwed motherhood from plaintiff's records);

Hill v. Johnson, supra;

Stone v. School Board of Calhoun County, supra.

See: Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976) (rule against employing unwed parents unconstitutional);

Dike v. School Board, 650 F.2d 783 (5th Cir. 1981) (teacher who wished to breastfeed her child during free period in privacy at school had fundamental personal liberty interest or privacy right which could be restricted only by regulations narrowly tailored to serve only sufficiently important state interests);

Lewis v. Delaware State College, 455 F.Supp. 239 (D.Del. 1978) (dismissal of dorm director for unwed pregnancy arbitrary in violation of substantive due process);

New Mexico State Board of Education v. Stoudt, 571 P.2d 1186 (N.M. 1977)(teacher dismissal arbitrary and unreasonable).

Pregnancy

In addition to the Title IX prohibition against discrimination on the basis of pregnancy, courts have found exclusion from school activities on the basis of pregnancy to illegal on other grounds.

Ordway v. Hargraves, 323 F.Supp. 1155 (D.Mass. 1971) (exclusion of unmarried pregnant student illegal);

In re Anonymous, C.A. No. 3624-N (M.D.Ala., bench ruling, Mar. 21, 1972) (exclusion of pregnant student unconstitutional);

Regina J. v. English, supra;

Hill v. Johnson, supra;

Stone v. School Board of Calhoun County, supra;

Nutt v. Goodland Board of Education, 128 Kan. 507, 278 P. 1065 (1929) (exclusion of unmarried pregnant student illegal);

In re Murphy, 11 Ed.Dept.Rep. 180 (N.Y.S.Ed.Comm'r 1972) (Clearinghouse No. 7289) (exclusion of pregnant student from graduation ceremonies arbitrary and unreasonable).

Cf.: Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (school system's rules concerning mandatory maternity leave for teachers violate due process clause);

Street v. Cobb County School District, supra.

Pregnant students also have the additional rights granted under Title IX regulations, reproduced above, such as the right to a leave of absence if deemed medically necessary by the student's doctor and the right to a comparable instructional program if any separate program is offered for pregnant students (which must be purely voluntary for students).

Further, some students who are pregnant may be protected by laws concerning students with special needs -- *not* in the sense that they should be treated as handicapped, but rather in the sense that (a) they may be entitled to additional services to insure that their educational program does not suffer as a result of the pregnancy or any related health problems and (b) they are protected by those laws from discrimination resulting from being perceived or treated as if they were handicapped. If pregnant students are included within the definition of "handicapped persons" under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Sec. 794) and "handicapped children" under the Education for All Handicapped Children Act (20 U.S.C. Sec. 1401 *et seq.*), then they are entitled to all protections of those acts concerning equal treatment, non-discrimination, provision of services necessary to meet their special needs in providing a full education, and integration into a regular program to the greatest extent practicable. Under the Education for All Handicapped Children Act regulations, 34 C.F.R. §300.5,

> (a) . . . "handicapped children" means those children evaluated in accordance with §§300.530-300.534 as being . . . other health impaired, . . . who because of those impairments need special education and related services. . . .
> (b)(7) "Other health impaired" means limited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickel cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

Under the section 504 regulations, 34 C.F.R. §104.3,

> (j) "Handicapped person." (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities [including "learning"], (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. (2) As used in paragraph (j)(1) of this section the phrase:
> (1)"Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; muscoloskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder. . . .
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such

> a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(1) of this section but is treated by a recipient as having such an impairment.

Pregnant students may also fall within the definition of special needs in certain state special education laws. See, for example, North Carolina General Statutes 115-363. Cf. the Massachusetts special education statute and regulations, which provide for a home or hospital program for any student who will be out of school for more than fourteen days for medical reasons; if the absence will be less than sixty days, the student need only obtain a statement from her own physician and need not go through the regular special education procedure. Massachusetts State Department of Education, Chapter 766 Regulations, §502.7. All of these laws must, of course, be read so as not to conflict with the rights guaranteed by Title IX.

Note that 126 school districts reported to the Office of Civil Rights on their 1980 OCR survey that they had policies which required pregnant students and/or students recovering from childbirth to attend separate programs as a substitute for regular programs, despite the clear Title IX prohibition against such mandatory programs. (Department of Education, Office for Civil Rights, 1980 Elementary and Secondary Schools Civil Rights Survey, National Summary of Reported Data, Table 2, page 7.)

D. OFFENSES RELATED TO NON-SCHOOL LAWS

1. RULES WHICH DUPLICATE OTHER CIVIL OR CRIMINAL LAWS

School codes often contain rather indiscriminite lists of offenses which are also prohibited by criminal law. Such duplication is not considered "double jeopardy" under the Fifth Amendment, since school disciplinary action is not considered "criminal" for purposes of the double jeopardy clause. See for example, *Clements v. Board of Trustees*, 585 P.2d 197 (Wyo. 1978). Nevertheless, it can be argued, under substantive due process or *ultra vires* concepts (see §VI), that duplication is permissable only when the school has some independent legitimate interest which is not adequately protected by the existing laws.

In holding that a search of a student's room at New Hampshire Technical Institute was illegal, the court in *Morale v. Grigel*, 422 F.Supp. 988, 997-98 (D.N.H. 1976) made a similar point:

> NHTI, as part of New Hampshire's university system, has a primary interest in maintaining and promoting an educational atmosphere. While the school also has a "legitimate interest in preventing disruption on the campus," *Healy v. James*, *supra*, 408 U.S. at 184, 92 S.Ct. at 2348, its interests are limited by its function as an educational institution. A college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society's rules and laws, just as it cannot, under the same aegis, deprive students of their constitutional rights. Therefore, the legitimacy of the interests protected by any particular rule or regulation of NHTI must be measured against its functioning as a pedagogical institution. . . .
>
> In this case, the school officials conducted a search of a student's dormitory room ostensibly looking for stolen goods. I need not address the issue of whether a search for illegal drugs is a reasonable exercise of a university's supervisory authority because I find that a search for stolen property is not. Defendants have not convinced this court that NHTI has a clearly distinguishable and separate educational interest, nor one that is not already served by the penal statutes of this state. . . . I note that the New Hampshire State Board of Education has already partially adopted this standard in its policies concerning student off-campus activities:

> B. * * * * *
>
> Where activities of students off-campus result in violation of law and interrogation by investigators the institutes should:
>
> * * * * *
>
> 2. Not duplicate the function of general laws unless the institute's interests as an academic community are distinctly and clearly involved.
>
> . . . .
>
> In summary, I rule that a check or search of a student's dormitory room is unreasonable under the Fourth Amendment unless NHTI can show that the search furthers its functioning as an educational institution. The search must further an interest that is separate and distinct from that served by New Hampshire's criminal law.

See also:

Smyth v. Lubbers, 398 F.Supp. 777, 790 (W.D.Mich. 1975) ("the College has not established that obedience to the drug laws and regulations is so crucial to the performance of its educational function that extraordinary means of enforcement must be allowed");

Board of Education of Long Beach Unified School District v. M., 566 P.2d 602 (Cal. 1977) (teacher dismissal);

Taylor v. Grisham, C.A. No. A-75-CA-13 (W.D.Tex., Feb. 24, 1975) (Clearinghouse No. 15,925 ("automatic" permanent suspension rule for drug use is invalid).

But cf.:

Caldwell v. Cannady, 340 F.Supp. 835, 840 (N.D.Tex. 1972).

2. RULES WHICH ALLOW PUNISHMENT FOR ARREST OR CONVICTION

In the section above, the issue is rules which read the same, or cover the same offenses, as other state or federal law. The issue in this section, on the other hand, is school rules which state that a student may be subjected to school discipline for being accused or convicted of violation of criminal law. In addition to the problems discussed above, such rules are improper in that the school must bring its own independent judgment to bear on the evidence, judged under its own standards which are based on the educational needs of the institution, rather than automatically ratifying the judgment of an external body acting in the name of laws which have different ends. See:

Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969);
Paine v. Board of Regents, 355 F.Supp. 199, 204 (W.D.Tex. 1972), aff'd, 474 F.2d 1397 (5th Cir. 1973);
Taylor v. Grisham, supra;
In re Rodriquez, 8 Ed.Dept.Rep. 214 (N.Y.Ed.Comm'r 169).

Cf.: Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D.Tenn., 5/3/79) (Clearinghouse No. 29,964H) (preliminary injunction against suspensions based solely on juvenile court charges; school must provide hearing to establish that student poses danger to persons or property in the school or poses an ongoing threat of disrupting the academic process);
Vincent v. Payne, C.A. No. 80-C-1165-S (N.D.Ala. 9/6/80) (Clearinghouse No. 31,325B) (preliminary injunction, substantial probability that policy denying state college admission to applicants who are subject to criminal charges not yet brought to trial or are convicted felons released on parole or probation would be found to deny due process and equal protection).

Compare:
Krasnow v. Virginia Polytechnic Institute, 551 F.2d 591 (4th Cir. 1977).

The harm is compounded when the school action is based only on an accusation or indictment rather than a conviction. See:

Howard v. Clark, 299 N.Y.S.2d 65, 59 Misc.2d 327 (1969);
Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972);
Brown v. Board of Education, supra;
Board of Education v. M., supra;
Devore v. Board of Education, 11 Ed.Dept.Rep. 296 (N.Y.S.Ed.Comm'r 1972).

A student may be held responsible, on the other hand, for example, for work or other academic obligations missed during the period that he/she is under arrest. This must, however, be done on a non-discriminatory basis, and the arrested student must be treated in the same manner as other absent students, for example, in terms of opportunity to make up missed work. See Woods v. Wright, 334 F.2d 369, 375 (5th Cir. 1964).

E. CONDITIONS BEYOND THE STUDENT'S CONTROL *

School disciplinary action sometimes punishes students for things which are not "their fault." This can take a variety of forms, such as:

- --Punishing the student for unintentional acts, such as accidental breakage of equipment, or disciplinary action for getting wrong answers on a test;
- --Punishing the student for conduct related to his/her handicap;
- --Punishing the student for conditions caused by the school, such as "disruptive" behavior which in fact has been provoked by racially discriminatory practices or by the school's failure to meet the educational needs of a handicapped or bilingual student:
- --Punishing the student for actions of other students, such as punishing an entire class for the actions of one unknown student or punishing a student for constitutionally protected expression because of the disruptive reactions of other students;
- --Punishing the student for actions or inaction of his/her parents, such as suspending the student until the parent comes to school, or punishing the student for non-payment of fees which, assuming the fees are legal in the first place, are really the parent's debt.

These actions are generally illegal under a variety of theories, most notably (a) they constitute punishment in the absence of personal guilt, in violation of a fundamental substantive due process right, and (b) they are arbitrary, capricious, and irrational, and therefore both *ultra vires* and violative of substantive due process. (See §VI.A and B.) Additionally, particular forms of such discipline may violate the First Amendment (§I), federal laws protecting handicapped students (§III.C), and/or the Equal Protection Clause (§VI.C).

A leading case in this area is *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974), where the court held that it was a denial of substantive due process to suspend a student and transfer her to another class because her mother had struck her teacher. The school attempted to justify its decision as a non-punitive response to the problems which the incident created for the teacher-student relationship and the teacher's disciplinary control over the rest of the class. The court rejected these arguments and held that the action violated the individual student's right to be punished only on the basis of personal guilt. "Traditionally, under our system of justice punishment must be founded upon an individual's act or omission, not from his status, political affiliation or domestic relationship." *Id*. at 425. Further, "a state cannot punish innocent membership in a group without regard for the accused's knowledge of the nature of the group." *Id*. at 426.

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*A Supreme Court decision issued as this book went to press has given renewed strength to the principles discussed throughout this section. *Plyler v. Doe*, ___ S.Ct. ____, 50 U.S.L.W. 4650 (6/15/82) is discussed at the end of this section.

As the court noted, the fundamental nature of the concept of personal guilt can be found in many Supreme Court cases, including:

> Wieman v. Updegraff, 344 U.S. 183 (1952);
> Scales v. United States, 367 U.S. 203 (1961);
> Robinson v. California, 370 U.S. 660 (1962);
> Elfbrandt v. Russell, 384 U.S. 11 (1966);
> Levy v. Louisiana, 391 U.S. 68 (1968);
> Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

The court in St. Ann held that the right not to be punished in the absence of personal guilt was a fundamental right for due process purposes, and therefore the school was required to demonstrate -- and failed to demonstrate -- that its actions served a compelling state interest which could not be served by any other reasonable alternative. The court further held that, even if this were not a fundamental right, the school's actions were irrational and failed to meet even a "rational relationship" test. (See §VI.B, "Substantive Due Process.")

Similarly, in Hairston v. Drosick, 423 F.Supp. 180, 182-83 (S.D.W.Va. 1976), a case dealing with a child who had spina bifida and required intermittent catheterization during the day, the court stated,

> The requirement of the plaintiff mother's intermittent presence at Gary Grade School as a condition of her child's being permitted to attend Gary Grade School, coupled with the impossibility of this request upon the plaintiff Sheila Hairston, constituted an exclusion of the plaintiff child from Gary Grade School. Further, even if the mother's presence were circumstantially possible, the right of a child to attend school cannot be legally conditioned upon the mother's presence at the school.

In Debra P. v. Turlington, 474 F.Supp. 244 (M.D.Fla. 1979), aff'd in relevant part, 644 F.2d 397, 403-07 (5th Cir. 1981), the court relied on St. Ann in striking down the state's new competency testing program under which students were denied high school diplomas for failing a "functional literacy" exam. The court found that such a major change in graduation requirements was a denial of due process as applied to students already in high school, since the test was based upon skills which should have been taught in the early grades and which they may not have been taught at all. 474 F.Supp. at 263-67. After noting that the state had other alternatives available, the court pointed out that the school systems themselves were responsible in part for the test results, declaring, id. at 267:

> The Court cannot help but focus on the fact that the present Plaintiffs have been the victims of segregation, social promotion and various other educational ills but have persisted and remained in school and should not now, at this late date, be denied the diplomas they have earned by the mastery of the basic skills and completion of the minimum

number of academic credits. . . . [I]n our country, the Constitution, including the due process clause, stands between the arbitrary government action and the innocent individual. *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974). The implementation schedule in effect relative to the functional literacy testing program with the diploma sanction is fundamentally unfair.

Similar to the due process principles articulated in *St. Ann v. Palisi* are *equal protection* cases which have found it improper to penalize persons for a status or characteristic over which they have no control. See:

Oyama v. California, 332 U.S. 663 (1948) (alienage);
Brown v. Board of Education, 347 U.S. 483 (1954) (race);
Robinson v. California, 370 U.S. 660 (1952) (addiction);
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (indigence);
Levy v. Louisiana, 391 U.S. 68 (illegitimacy);
Weber v. Aetna Causalty & Surety Co., 406 U.S. 164, 175 (1972) (illegitimacy; "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing");
Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy);
Plyler v. Doe, *supra* (children of undocumented aliens) (discussed below).

1. UNINTENTIONAL ACTIONS -- ACCIDENTS, GETTING THE WRONG ANSWER, ETC.

In some cases, it may be a denial of due process, based on the individual guilt/due process notion above, to punish the student for accidental breakage, etc., in the absence of any evidence of intentional wrongdoing. In any event, it can be argued that such punishment is irrational, since it serves no deterrent or other [illegible]ose, and therefore is *ultra vires* and/or a denial of substantive due process. Thus, state courts have overturned school actions in regard to property damage as *ultra vires*:

Perkins v. Independent School District, 56 Iowa 476, 9 N.W. 356, 357 (1880) ("It would be very harsh and unjust to deprive a child of education for the reason that through accident and without intention of wrong he destroyed property of the school district;" therefore improper to exclude student until debt was paid);

State v. Vanderbilt, 116 Ind. 14, 18 N.E. 266 (1888) (children cannot be punished for unintentional acts; a rule is unreasonable if it requires of pupils "what they cannot do," such as requiring payment which they cannot afford);

Holman v. School Trustees, 77 Mich. 605, 43 N.W. 996, 997 (1889) (overturning regulation requiring exclusion until damage is paid for; "A boy 10 years old, or even older, cannot be expelled or suspended for a careless act, no matter how negligent, if it is not willful or malicious").

Cf.: Board of Education of Piscataway Township v. Caffiero, 86 N.J. 308, 431 A.2d 799, 803 (1981) (court narrowed statute, which makes parents liable for child's damage to school property, to apply only to "willful and malicious acts," stating that it would not serve the statute's purpose of deterrence and discipline to apply it where the child had acted either negligently or without fault).

See also the equal protection cases cited above.

As to punishment for getting "wrong" answers, see also Coats v. Cloverdale Unified School District Governing Board, No 80029 (Cal.Super.Ct., Sonoma County,1/20/75) (Clearinghouse No. 14,462), where a court issued a writ of mandamus, stating that it appeared that the school had acted beyond its statutory authority and/or violated the student's rights of due process and/or equal protection when the student was failed in physical education, preventing his graduation, because he refused to run laps around the gymnasium as punishment for being on the losing side of a volleyball game.

2. PUNISHING THE STUDENT FOR HANDICAP-RELATED CONDUCT

It is a violation of both the Education for All Handicapped Children Act, "Public Law 94-142" (20 U.S.C. §1401 et seq.) and "Section 504" of the Rehabilitation Act (29 U.S.C. §794) to suspend or otherwise punish students for conduct which is a manifestation of a handicap. The school is instead required to design an appropriate program of special education and related services to deal with the student's needs. See discussion in §III.C, "Discipline of Handicapped Students."

3. PUNISHMENT FOR CONDITIONS CAUSED BY SCHOOL -- EFFECTS OF RACIAL DISCRIMINATION, INAPPROPRIATE EDUCATION, UNMET SPECIAL NEEDS, ETC.

As noted above, the court in Debra P. v. Turlington based its due process holding in part on the unfairness of denying diplomas to students who failed tests because of the school's past practices of segregation, social promotion, and failure to teach the skills which the test attempted to measure.

Based on its finding that the higher failure rate among black students was caused in part by their attending segregated schools in the early grades, the court also held that the testing scheme violated equal protection. 474 F.Supp. at 250-57. The court relied on a series of cases which have held that the state may not treat people differently through programs which, while neutral on their face, perpetuate the effects of the state's own prior discriminatory actions, e.g.:

Louisiana v. U.S., 380 U.S. 145 (1965);
Gaston County v. U.S., 395 U.S. 285 (1969) (literacy test as requirement for voting improperly perpetuated the state's discriminatory educational practices);
McNeal v. Tate, 508 F.2d 1017 (5th Cir. 1975);
U.S. v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978).

The court in Hawkins v. Coleman, 376 F.Supp. 1330 (N.D.Tex. 1974), which held that the higher suspension and corporal punishment rates for black students in Dallas were the result of racial discrimination, also implicitly recognized the impropriety of punishing students for conditions created by the schools themselves -- finding that the higher rates were caused in part by the frustrations which black students experienced as a result of racism in the school, as well as by selective punishment of black students for behavior equivalent to that of white students. (See §III.A for further discussion of racial discrimination in discipline.)

The same principles apply to discrimination on the basis of national origin. Moreover, it is a violation of federal (and, often, state) law to fail to address the educational and language needs of students who are not proficient in English and then to punish students for behavior resulting from the denial of equal educational opportunity. (See §III.A for discussion concerning national origin discrimination and bilingual education.)

Similarly, it is a violation of the federal handicapped laws to fail to provide appropriate education designed to meet the special needs of handicapped students and then to punish students for "misconduct" resulting from the frustration caused by the failure to meet those needs. (See cases and discussion in §III.C.)

Other cases which indicate a sensitivity to conditions caused by the school's own actions include:

State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo.App. 1977) (in requiring school to issue diploma to student who had accumulated sufficient credits but who had been absent during last eight weeks of junior year, court noted evidence that tended to show that the absence was coerced by the principal);
Castillo v. South Conejos School District, C.A. No. 79-CV-16 (Colo. Dist.Ct., 4/18/79) (improper to deny high school student the right to participate in graduation ceremonies because she had, with the board's approval, taken extra courses in order to graduate early);

Due process cases based on the student's reliance on a school rule or policy which the school then ignores, violates, or changes -- see §V.E, "School's Failure to Follow Its Own Rules."

4. PUNISHMENT FOR ACTIONS OF OTHER STUDENTS

Under the substantive due process principles set out in St. Ann v. Palisi, supra, punishing one student for the misconduct of another, or punishing a whole group of students because there is not enough evidence to fix the blame on any one particular student, clearly violates the right to be free of punishment in the absence of individual guilt and is also arbitrary, irrational, capricious, and fundamentally unfair. In the latter terms, it is also ultra vires.

Similarly, in Strickland v. Inlow, 519 F.2d 744, 747 (8th Cir. 1975), the court held that the school board's failure to distinguish between the conduct of the suspended students and that of a third student constituted an arbitrary denial of the right to education, in violation of due process. See Bunger v. Iowa High School Athletic Association, 197 S.W.2d 555 (Ia. 1972), where the court found it unreasonable to remove a student's athletic eligibility merely because he rode in a car in which he knew there was unopened beer. But cf. Rose v. Nashua Board of Education, 506 F.Supp. 1366 (D.N.H. 1981) (on appeal), where the court upheld the temporary suspension of bus routes for up to five days because of student vandalism without discussing the principles or cases concerning individual guilt.

The First Amendment protects students against being punished or restricted for exercising rights of expression to which other students respond disruptively, unless the students use "fighting words" or "incitement," narrowly defined. See §I.A.1.d. With the same narrow exceptions, students cannot be punished or restricted for participating in, or merely being present at the scene of, assemblies or demonstrations in which other students become disruptive (see §I.B.5), or for participating in organizations which may have unlawful aims unless there is knowledge of, and specific intent to further, those aims (see §I.B.6).

Similar principles lie behind the Fourth Amendment requirement that there be specific cause to search a specific individual, thus banning blanket searches of entire classes. See cases cited in §IV.B.

5. PUNISHMENT FOR PARENTAL ACTIONS *

As noted in both St. Ann v. Palisi and Hairston v. Drosick, supra, excluding or otherwise punishing the child for the action or inaction of the parent is a violation of substantive due process. Aside from incidents such as that in St. Ann, where the parent's aggressive conduct provokes action against the student, the issue most frequently arises in two other contexts:

a. "YOU'RE SUSPENDED UNTIL YOUR PARENT COMES IN"*

This form of suspension (sometimes not called a "suspension" at all) is forbidden both under St. Ann, supra, and under Hairston, where the court specifically declared that "the right of a child to attend school cannot be conditioned upon the mother's presence at school." 423 F.Supp. at 183. In addition to the substantive due process violation in punishing the student for the (in)action of another person, this practice creates other legal problems.

First, if the parent fails to come in, the suspension will become so lengthy that it may well be disproportionate to the offense, also in violation of substantive due process and ultra vires. (See §VIII.A, "Lengthy Exclusions as Excessive or Unwarranted.")

Second, for the same offense, some students may return to school very quickly while others may be out of school indefinitely, depending upon whether their parents appear, and this difference in punishment for the same offense may become so great as to violate equal protection requirements. (See §VI.C, "Equal Protection.")

Third, because of differences as to which parents can easily appear at school -- in terms of work obligations, child-rearing, transportation difficulties, etc. -- the practice may often result in longer exclusions for students with lower incomes, who may also more often be minority students, thus increasing the equal protection problems. Language barriers between home and school may also affect the rate at which different parents easily appear. (See also §III. on discrimination in discipline.)

Fourth, when a suspension that nominally allows the student to return in, e.g., two days in fact may be much lengthier if the parent does not come in, the hearing procedures adequate to a two-day suspension will actually be inadequate given the real length of the suspension, in violation of procedural due process. (See the Procedural Rights portion of this manual, §§IX.B, X.B, and XI.)

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*See discussion of Plyler v. Doe, below.

In addition to the legal problems, indefinite exclusions make the student's relationship to the school much more tenuous. They often play a central role in the "drop-out" or "push-out" phenomenon.

b. PUNISHMENT OF STUDENTS FOR NONPAYMENT OF FEES*

Schools often charge fees for various items, and these fees may or may not be illegal. The legality of the fees themselves is beyond the scope of this manual, but the Center for Law and Education has other material available on the issue. Assuming the fee itself is legal, however, the school's attempt to impose sanctions on the student for non-payment of the fee may be illegal, in part for many of the reasons discussed above.

First, if the parent is the person legally responsible for payment of the fee, it becomes illegal to punish or harm the student for the parent's failure to pay.

Chandler v. South Bend Community School Corp., C.A. No. 71-S-51 (N.D.Ind., Aug. 26, 1971) (suspension, withholding report cards, and other actions against students because of parents' non-payment or failure to sign an "inability to pay" form denies students equal protection);

In re Distribution of Educational Books and Materials to Underprivileged Students in West Virginia, C.A. No. MDL 280 (N.D.W.Va., 6/17/77) (Clearinghouse No. 22,055H) (denial of equal protection because no legitimate purpose served by depriving the students of basic education and materials because of parents' failure to pay fees or provide textbooks and materials);

Doe v. Plyler, 458 F.Supp. 569 (E.D.Tex. 1978), aff'd, 628 F.2d 488 (5th Cir. 1980)**, (denial of equal protection to charge tuition to undocumented aliens and then bar their children for non-payment);

In re Alien Children Education Litigation, 501 F.Supp. 544, 572-73 (S.D.Tex. 1980)**;

Shaffer v. Board of School Directors, 522 F.Supp. 1138, 1144-45 (W.D.Pa. 1981) (unconstitutional to provide only one-way bus transportation to kindergarten for indigent students, relying on the reasoning in In re Distribution).

See: St. Ann v. Palisi, supra (and cases cited therein);

Hairston v. Drosick, supra;

Equal protection cases cited in the introduction to this section under which such policies may create a classification which penalizes children for a status or characteristic over which they have no control -- the families to which they are born.

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*See discussion of Plyler v. Doe, below

**Aff'd, Plyler v. Doe, supra (discussed below).

In most states, parents are responsible for any contractural debts for their children's necessities -- including food, clothing, shelter, and education -- until the child reaches the age of majority or becomes emancipated. Also, some states provide that parents are liable, up to a certain amount, for their minor children's willful property damage. See, e.g., Massachusetts Gen. Laws, Ch. 231, §85G.

Second, it can be argued, under the ultra vires doctrine [see §VI.A(2)], that even if the school has authority to charge the fee and it is otherwise legal, the school has not been given authority by the legislature to impose the particular punishment for non-payment.

Opinion of the Attorney General, O.A.G. No. 6137 (Oregon, June 1, 1966) (students may not be denied opportunity to take final examinations because of non-payment of fees);

Perkins v. Independent School District, 56 Ia. 476, 9 N.W. 356 (1880) (no authority to exclude students for non-payment of fees or damages; exclusion rule was found not to be intended to secure good order, but to enforce an obligation to pay a sum of money, and as such was not within school's authority).

Third, the particular punishment for non-payment may simply be found to be unreasonable, unrelated to any legitimate school purpose, arbitrary, or excessively harsh, under equal protection, sustantive due process, or ultra vires doctrines.

Opinion of the Attorney General, AGO 61-62, No. 48 (Washington, July 21, 1961)(unreasonable and arbitrary and capricious to refuse to send transcript to student's new school for failure to pay fines for lost books, etc.);

Detro v. Miami University, CV 72-05-0336 (Ohio Ct. of Common Pleas, Butler County, Dec. 27, 1972) (withholding grades and diploma for failure to pay motor vehicle fine struck down as unusual and unreasonable punishment).

Fourth, even if the sanction for non-payment is upheld generally, it may nevertheless be illegal as applied to students who cannot afford the fees. Two theories can be argued here: (1) that punishing students who cannot afford the fees serves no legitimate purpose (under equal protection, due process, or ultra vires doctrines), since punishment or the threat of punishment will not produce money that the student does not have; or (2) that punishing students for a status over which they have no control (poverty) violates equal protection and/or due process (an argument similar to the claim above concerning the punishment of students for their parent's actions). See:

State v. Vanderbilt, 116 Ind. 14, 18 N.E. 266 (1866) (unreasonable to punish students for not paying for damaged property, since "no rule is reasonable which requires of the pupils what they cannot do," and the "vast majority of pupils . . . have no money at their command with which to pay for school property" and would have no power to pay if their parents were unable or unwilling to provide it);

In re Distribution, *supra* (no legitimate purpose served by denying textbooks to needy students whose parents are unable to pay textbook fees, noting both that the policy punishes the students rather than the parents and that nothing is gained by enforcement procedures when the parent simply does not have the money);

Handsome v. Rutgers University, 445 F.Supp. 1362 (D.N.J. 1978) (no legitimate purpose served by applying penalties for non-payment -- withholding transcript and denying registration -- to student whose loan debts were discharged in bankruptcy);

Shaffer v. Board of School Directors, *supra* (applying reasoning of *In re Distribution* to kindergarten bus transportation);

Tate v. Short, 401 U.S. 395 (1971) (no rational relationship to any legitimate purpose under Equal Protection Clause in jailing an indigent person for failure to pay a fine, since it does not aid in collecting the fine);

Williams v. Illinois, 399 U.S. 235 (1970) (similar holding).

Cf.: *Sneed v. Greensboro City Board of Education*, 264 S.E.2d 106, 113-14 (N.C. 1980).

See also:
§III.D, "Wealth Discrimination."

Finally, it is illegal for the school to deny a student any of his/her other legal rights because of non-payment. For instance, some schools withhold report cards or diplomas for failure to pay other fees or fines. This is improper where the student, under federal or state law, has a right to copies of his/her records, transcript, or diploma. (See §XII.A, "Student Records.") [Except in Albany County, New York, where a court held that a former college student could be denied his rights of access, unequivocally provided under the Federal Educational Rights and Privacy Act, for non-payment of fees, because the Act mandates schools to establish "appropriate procedures for the granting of . . . access." *Spas v. Wharton*, 431 N.Y.S.2d 638 (Sup.Ct., Sp.Term, Albany County, 1980).]

(§VII.E, generally)

RECENT SUPREME COURT DECISION IN PLYLER V. DOE

On June 15, 1982, the Supreme Court used and reinvigorated the principles above to hold, under the Equal Protection Clause, that Texas may not exclude from the schools the children of undocumented aliens for non-payment of a tuition fee not imposed on other children. *Plyler v. Doe*, ___ S.Ct. ____, 50 U.S.L.W. 4650 (1982). Emphasizing that the children had no control over either their parents' conduct or their own status as undocumented aliens, the Court stated, "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." (4655) The Court held that depriving students of their important interests in education upon such a basis could be justified only under a higher standard of "rationality" than usual. (4654, 4656) This form of discrimination "can hardly be considered rational unless it furthers some substantial goal of the State." (4656) A lengthy excerpt from the opinion addressing this issue is reprinted at the end of §VI.C, "Equal Protection."

VIII. CHALLENGING SPECIFIC TYPES OF PUNISHMENT

A. EXCLUSION (SUSPENSION, EXPULSION, ETC.)

Some suspensions and expulsions may be challenged on a number of substantive grounds:

1. Lengthy exclusion as a total deprivation of the fundamental right to a basic education under state or federal Equal Protection or Due Process Clauses, requiring the school system to demonstrate a compelling state interest which cannot be served through any less drastic means;
2. Exclusion as so disproportionate to the offense, or so irrational or unreasonable in some other terms, that it fails to meet even the lower standards of a rational relationship test under the Due Process or Equal Protection Clause or ultra vires doctrines;
3. Exclusion as a response by the legislature -- i.e., other forms of ultra vires doctrines;
4. Exclusions which violate federal or state law protecting handicapped students;
5. Exclusions which are part of a pattern of discrimination on the basis of race, national origin, sex, or (perhaps) wealth.

In Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972), the court, after analyzing educational rights in terms of due process, equal protection, and the District of Columbia Code, issued notice and hearing requirements for all suspensions, transfers, and other exclusions beyond two days, including a provision that "No suspension shall continue for longer than ten (10) school days after the date of the hearing." (The court also required the school system to provide "some form of educational assistance and/or diagnostic examination during the suspension period.")

In Berry v. School District of City of Benton Harbor, 515 F.Supp. 344, 380 (W.D.Mich. 1981), the court, in designing a remedy for unconstitutional segregation, ordered the establishment of a biracial committee of principals, board members, parents, teachers, students, and community members. In requiring the committee to develop a uniform discipline code, the court stated, "Use of suspension or expulsion should be limited to a last resort and the committee should explore the use of effective alternatives to suspension or expulsion."

Consent decrees have sometimes required use of preventive measures, informal conferences to attempt to resolve problems without punishment, and other alternatives before resorting to exclusion. See, e.g., Smith v. Ryan, C.A.No. B-75-309 (D.Conn. 10/25/78)(Clearinghouse No. 25,461); Bobbi Jean M. v. Wyoming Valley West School District, C.A.No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B).

Strict Scrutiny for Deprivation of Basic Education

A disciplinary exclusion which is so long that it has the effect of depriving the student of even a minimally adequate education and/or the opportunity to obtain the basic skills necessary to exercise rights of free expression or political participation may affect a fundamental right under the federal Equal Protection Clause, thus requiring a demonstration that the exclusion is necessary to serve a compelling state interest which cannot be achieved through less drastic means. See the cases and discussion in "Education as a Fundamental Interest?" under §VI.C, "Equal Protection." To the degree that this minimal education is a fundamental right under the Equal Protection Clause, it is also fundamental for purposes of a similar substantive due process standard. (See §VI.B.) If any school action impinges on a fundamental right to education, certainly a permanent expulsion would.*

Alternatively, as discussed in the same portion of §VI.C, "Equal Protection," some states regard education as a fundamental interest under the state's Equal Protection Clause or education provisions, and in such states it may be possible to argue that disciplinary exclusions should be subject to strict judicial scrutiny, even, in some cases, if not permanent.

Rational Relationship Test -- Exclusion as Excessive or Irrational*

For the basic doctrines of ultra vires, substantive due process, and equal protection under which school actions can be struck down if arbitrary, capricious, or not rationally related to some legitimate, authorized school function, see §VI.A, B, and C.

Even if education is not regarded as a fundamental right, the length of the exclusion is relevant under this lower standard of rational relationship, since a great disproportion between the offense and the punishment, or a demonstration that the school had no reason to ignore less drastic means of discipline, can contribute to a showing that the exclusion is unreasonable. Unlike the strict scrutiny test above, under this test the burden of proof is generally on the student.

In Tavano v. Crowell, Equity No. 32699 (Mass.Super.Ct., Barnstable County, 8/31/73) (J. David Nelson, now a federal judge), the court overturned a permanent expulsion, despite findings of misconduct, on the grounds that the punishment was too extreme in relationship to the misconduct and to the availability of other alternatives:

> However, although I find that there was sufficient evidence to find misconduct upon the part of the petitioner, I nevertheless find that upon the review of all of the evidence and statements of the Committee, the respondent exceeded what was reasonable and expected by its use of an extreme and ultimate sanction in response to those acts of misconduct they could have found to have occurred. I find that the action of the Committee in so expelling the petitioner was unwarranted by facts found in the record.
>
> . . . [P]rior to its use, it was incumbent upon the Committee to establish that the conduct of the petitioner was such that he could reasonably expect such use of ultimate authority, and if the Committee intended to impose this sanction, the evidence supporting the allegations of such conduct as would warrant its use, be clear convincing, and unambiguous. I find that the petitioner was not clearly apprised of such potential consequences, nor was the evidence supporting those acts of misconduct which would reasonably lead to permanent expulsion so clear and sufficient as to permit that result.

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*Federal standards for reviewing school exclusions should now be considered in light of Plyler v. Doe, ___ S.Ct._____, 50 U.S.L.W. 4650 (6/15/82), decided as this book went to press, and discussed in §VI.C.

> More importantly, however, to this decision is that I find that there was substantial failure by the Committee or the school to utilize other sanctions and resources readily available to them, and under the statutes of this Commonwealth, expected to be so utilized. . . .
>
> Clearly there is a responsibility upon the part of the respondents to provide an educational opportunity using reasonable means available. . . .[I]t is the opinion of this court that in view of the alternatives available and not yet attempted, the results here cannot be justified upon the record.

In *Independent School District No. 8 v. Swanson*, 553 P.2d 496 (Okla. 1976), the court held that students could not be suspended for violation of the school's hair code, even though the court found that there was no constitutionally protected interest in controlling one's own hair length. The court found that the exclusion for violation of the rule failed the following test (501):

> In view of the explicit state commitment to the education of each child, it is certain that while a student's right to be present in school is not absolute, any rule which would exclude him must exist for a reasonable and necessary purpose.

In *Brown v. Board of Education of Tipton County*, C.A. No. 79-2234-M (W.D.Tenn., 5/3/79) (Clearinghouse No. 26,964H), the court held that the school system's manner of suspending students pending juvenile court proceedings violated substantive due process, with the court finding that it was inappropriate for principals to suspend for more than ten days, that there was no consistency as to the stage of juvenile court proceedings at which students were suspended, that the principal failed to consider the length of suspensions, and that suspension could not be based solely on juvenile court charges. The court further set out a standard for suspensions which could presumably be applied in other contexts:

> The defendants shall not be permitted to suspend the plaintiffs from school solely because they are charged with an offense in juvenile court, but *may only suspend* such students *if, after a hearing* as set forth above, it is established that *the juvenile poses a danger to persons or property in the school or poses an ongoing threat of disrupting the academic process*. [Slip Op. at 3; emphasis added.]

This decision thus raises the issue of whether suspension or expulsion is ever justified for students who do not pose a real, ongoing danger of physical injury or serious disruption, particularly in light of available alternatives for dealing with less serious offenses. (Note, however, the need for specific definition of "substantial disruption," which may otherwise become a catch-all. For First Amendment cases which have required a definition, see §I.A.2.)

Other courts, in addition to *Tavano* and *Swanson*, which have found that lengthy or indefinite disciplinary exclusions were too harsh to bear a reasonable relationship to the misdeed or too harsh in light of available alternatives, and thus were *ultra vires*, include:

Perkins v. Independent School District, 56 Iowa 476, 9 N.W. 356, 357 (1880) ("very harsh and unjust to deprive a child of education for the reason that through accident and without intention of wrong he destroyed property of the school district;" therefore improper to exclude until debt was paid; see §VII.E);

Holman v. School Trustees, 77 Mich. 605, 43 N.W. 996, 997 (1889) ("A boy 10 years old, or even older, cannot be expelled or suspended for a careless act, no matter how negligent, if it is not willful or malicious;" improper to exclude until debt was paid; see §VII.E);

King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505 (Civ.Ct., N.Y.C., Kings County, 1980) (being "too much of an exhibitionist'" not just cause for dismissal; contract action; see §VI.E.);

In re Giarraputo, 8 Ed.Dept.Rep. 193 (N.Y.Ed.Comm'r 1969);

In re Liebson, 16 Ed.Dept.Rep. 25, Dec. No. 9286 (N.Y.Ed.Comm'r 1976);

In re Bruce, 16 Ed.Dept.Rep. 143, Dec. No. 9337 (N.Y.Ed.Comm'r 1976) (indefinite suspension beginning June 2, 1976, with opportunity to take June 1976 final exams, held disproportionate to offenses where student was charged with abusive and vulgar language, an unprovoked assault on another student, and a poor attendance record);

Ector County Independent School District v. Hopkins, 518 S.W.2d 576 (Tex.Ct.Civ.App. 1975);

Wayland v. Hughes, 43 Wash. 441, 86 P. 642 (1906) (dictum).

See: In re Burton, 16 Ed.Dept.Rep. 195, Dec. No. 9361 (N.Y.Ed.Comm'r 1976) (remanded for reconsideration of penalty);

Alvin Independent School District v. Cooper, 404 S.W.2d 76 (Tex. 1966).

Compare:

Giles v. Marple Newton School District Board of Directors, 367 A.2d 399 (Pa.Comm.Ct. 1976) (upholding expulsion for smoking marijuana);

Abremski v. Southeastern School District Board of Directors, 421 A.2d 485 (Pa.Comm.Ct. 1980) (upholding 40-day expulsion, with home education program, for smoking marijuana);

Ring v. Reorganized School District No. 3, 609 S.W.2d 241 (Mo.App. 1980).

Similarly, courts other than Brown v. Board of Education of Tipton County, supra, have struck down lengthy exclusions on substantive due process grounds in:

Cook v. Edwards, 341 F.Supp. 307 (D.N.H. 1972) (harm to student of indefinite expulsion for intoxication outweighed school's interest in discipline);

Paine v. Board of Regents, 355 F.Supp. 199 (W.D.Tex. 1972) (automatic two year suspension for narcotics conviction unreasonable);

Brown v. Board of Education of Tipton County, supra;

In re Anonymous, C.A. No. 3624-N (M.D.Ala. 3/21/72).

See: Mills v. Board of Education, supra.

Cf: Cordova v. Chonko, 315 F.Supp. 953, 963 (N.D.Ohio 1970) (unreasonable and violative of right to due process and fair treatment for principal to suspend student for hair length where board had not specifically authorized such discipline);

Hasson v. Boothby, 318 F.Supp. 1183, 1187-88 and n.8 (D.Mass. 1970) (exclusion from after-school activities for one year as penalty for appearing at school dance after drinking alcohol "might approach the order of arbitrary and capricious in a constitutional sense" if students demonstrated good behavior after the incident, but here the penalty would be subject to frequent review and was invariably lifted in prior cases well before the full penalty was served);

Harris v. Mechanicsville Central School District, 382 N.Y.S.2d 251 (S.Ct., Schenectady County, 1976) (dismissal of teacher held excessive as punishment for two acts of "insubordination" -- leaving meeting without consent and failing to carry out agreement concerning teaching of a certain book).

Compare:

Mitchell v. Board of Trustees, 625 F.2d 660, 664-65 (5th Cir. 1980) (upholding expulsion for remainder of semester for bringing knife to school in case where there was evidence that students threatened to use it);

Caldwell v. Cannady, 340 F.Supp. 835 (N.D.Tex. 1972) (expulsion for no less than the balance of the semester and no more than the balance of the year not unreasonable as punishment for sale, use, or possession of narcotic drugs);

Herman v. University of South Carolina, 341 F.Supp. 226, 232 (D.S.C. 1971), aff'd, 457 F.2d 902 (4th Cir. 1972) (expulsion following sit-in not unreasonable);

White v. Knowlton, 361 F.Supp. 445 (S.D.N.Y. 1973) (use of single penalty of expulsion for any violation of military academy's honor code not a denial of substantive due process);

Fisher v. Burkburnett Independent School District, 419 F.Supp. 1200, 1204-05 (N.D.Tex. 1976) (suspension for a trimester as punishment for "serious overdose" of drugs not a denial of substantive due process; however, "The disparity between misconduct and punishment would be considerably greater had the plaintiff been caught with a joint of marijuana or a bottle of wine in her purse. A great enough disparity between the offense and punishment in an individual case might render the punishment an unreasonable means to attain the legitimate end of general deterrence . . .");

Pegram v. Nelson, 469 F.Supp. 1134, 1141 (M.D.N.C. 1979) (ten-day suspension plus exclusion from after-school activities for remainder of year reasonably related to offense of stealing wallet at basketball game);

Petrey v. Flaugher, 505 F.Supp. 1087 (E.D.Ky. 1981) (expulsion for remainder of year for smoking marijuana not a denial of substantive due process; student was readmitted after initial hearing).

Aside from questions of harshness, exclusions of any length may be challenged if it can be shown that they simply serve no valid purpose and are therefore irrational, ultra vires, and violative of substantive due process or equal protection. This may provide a handle in challenging, for example, suspension from classes as a punishment for skipping classes. (See §VIII.C.) Cases taking this type of approach include:

State v. Vanderbilt, 117 Ind. 11, 18 N.E. 266 (1888) (rule is unreasonable if it punishes students for failing to do what they cannot do, such as paying fees for damage which they cannot afford);

Other cases throughout §VII.E, "Conditions Beyond the Student's Control;"

Brown v. Board of Education of Tipton County, *supra*;

Cases striking down as serving no valid purpose exclusion of students who are pregnant, married, or parents, including:

Perry v. Grenada Municipal School District, 300 F.Supp. 748 (N.D.Miss. 1969);

Ordway v. Hargraves, 323 F.Supp. 1155 (D.Mass. 1971);

Shull v. Columbus Municipal School District, 338 F.Supp. 1376 (N.D.Miss. 1972);

In re Anonymous, *supra*;

Nutt v. Board of Education, 128 Kan. 507, 278 P. 1965 (1929);

Board of Education v. Bentley, 383 S.W.2d 677 (Ky. 1964);

McLeod v. State, 154 Miss. 468, 122 So. 737 (1929);

Alvin Independent School District v. Cooper, *supra*.

Cf.: *McCluskey v. Board of Education*, 662 F.2d 1263 (8th Cir. 1981) (unreasonable violation of substantive due process for school board, in expelling student, to apply its rule concerning drugs to the use of alchohol, particularly where the school rule referred to a state law definition of drugs which in turn excluded alcohol and where alcohol was treated under a different school rule), *rev'd per curiam*, 50 U.S.L.W. 3998.25 (7/2/82).

For further discussion, see:

Robert Pressman, "Due Process of Law in School Discipline: Recent Decisions," 14 *Inequality in Education* 55, 62-63 (1973);

Merle McClung, "The Problem of the Due Process Exclusion," 3 *Journal of Law and Education* 491 (1974) [earlier version in Center for Law and Education, *Classification Materials*, 155 (1973)];

The discussion of excessive punishment in §VIII.B, "Corporal Punishment."

Exclusion as Unauthorized by the Legislature

In addition to the *ultra vires* challenge which takes the form of arguing that there is no reasonable relationship between the exclusion and an educational function authorized by the legislature, discussed immediately above, other *ultra vires* doctrines -- under which "reasonableness" is not enough -- are discussed in §VI.A, notably,

(a) That the legislature having authorized some forms of suspension or authorized other responses to a problem has thereby silently ruled out other responses; or

(b) That the school system cannot rely on a general delegation of authority to discipline or suspend in the absence of more specific standards by the legislature for suspension.

Challenges to suspension based on these two latter grounds have been addressed in:

Davis v. Central Dauphin School District School Board, 466 F.Supp. 1259 (M.D.Pa. 1979) (where state statutes gave teachers, vice principals, and principals charge over student conduct and gave principals and school boards the power to suspend, the general authority of the superintendent over the school district did not include the authority to suspend);

Opinion of the Attorney General, OAG No. 075-148 (Fla. 5/29/75) (where compulsory attendance laws provide for investigation, reporting, and prosecution, school districts have no authority to suspend or expel for unexcused absences or truancy);

Commonwealth v. Johnson, 309 Mass. 476, 35 N.E.2d 801 (1941) (school districts have no authority to expel students under a statute which required flag salutes, since statute provided no specific punishment; constitutional issues not reached);

Howard v. Clark, 299 N.Y.S.2d 65, 59 Misc.2d 327 (1969) (where state statute authorized suspension of students (a) who are insubordinate or disorderly, (b) whose conduct otherwise endangers the health safety, morals or welfare of others, (c) whose physical or mental condition endangers the health, safety or morals of himself or others, or (d) who is found to be feebleminded, the court held that the statute provided no authority to suspend a student for criminal charges of off-campus heroin possession; further, the court held that there is no inherent authority to suspend for reasons not stated in the statute);

Matter of Mooney, 180 N.Y.L.J. No. 28, p. 12 (8/10/78) (Clearinghouse No. 25,136) (principal exceeded his authority by suspending students, because (a) state law permitted school boards to delegate to principal the authority to suspend for up to five days, but there was no evidence that this board had done so; (b) there was no opportunity for a conference as required by the statute; and (c) in any event, the suspension exceeded the statutory limit of five days);

King v. Farmer, 424 N.Y.S.2d 86 (Sup.Ct., Westchester County, 1979) (similarly to Howard v. Clark, supra, court held that truancy was not included within the grounds set forth in the suspension statute, and, further, the legislature had separately addressed the issue of attendance through different means).

See: Cordova v. Chonko, 315 F.Supp. 953 (N.D.Ohio 1970) (where statute authorized school boards to issue regulations governing student conduct and board in turn issued regulations stating that principal should develop rules governing cleanliness and clothing, principal exceeded his authority by suspending student for hair length);

Alexander v. Thompson, 313 F.Supp. 1389 (C.D.Cal. 1970) (general statute authorizing school boards to issue disciplinary rules could not be relied upon as authority to issue dress and grooming regulations in absence of more specific legislative standards for regulating appearance);

Galveston Independent School District v. Boothe, 590 S.W.2d 553 (Tex.Civ.App. 1979) (where state statute authorized expulsion pursuant to local regulations, expulsion for one quarter struck down as *ultra vires* where school district failed to follow its own rules concerning use of other alternatives prior to resorting to expulsion and notice to parents of alternatives which were attempted, and where marijuana rule did not clearly apply of off-campus possession).

Cf.: Armstrong v. Board of Education, 430 F.Supp. 595 (N.D.Ala. 1977) (board cannot rely on its general powers to unilaterally fire employee or eliminate funding for his position where state statute provides for superintendent's consent to such actions).

These cases and the ultra vires doctrines which lie behind them are discussed more fully in §VI.A.

Exclusions Which Violate Laws Protecting Handicapped Students

Where the student has been classified as handicapped, or is awaiting special education evaluation or appeals decision, the illegality of any exclusion other than a very short suspension in emergency situations is discussed in §III.C.

In addition, for students who are not already classified, "Behavior which is serious enough to justify expulsion from school may constitute a handicap." Merle McClung, "Alternatives to Disciplinary Expulsion from School," 20 Inequality in Education 58, 65 (1975). In other words, expulsion should not be considered in the absence of extreme and persistent misconduct, but in the case of such a student, the question then becomes whether such misconduct is itself, or is a manifestation of, a special need which should be addressed. See also the regulations for §504 of the Rehabilitation Act, which applies to all recipients of federal funds, under which a person is treated as "handicapped," and thus protected against discriminaton on the basis of his/her "handicap," if he/she "is regarded as having an impairment," regardless of whether or not an impairment actually exists. 34 C.F.R. §104.3 (j). In any event, one possible response for students facing lengthy disciplinary exclusions is to request an evaluation for special needs and file a complaint under the federal handicapped laws, which would then entitle the student to remain in his/her current placement (except for a very short emergency suspension) pending the outcome. There are, however, obvious potential dangers in invoking these laws and labeling the student. These issues are more fully discussed in §III.C.

Exclusions Which Are Part of a Discriminatory Pattern

If statistics or other evidence reveal that disciplinary exclusions are imposed disproportionately by race, national origin, primary language, sex, or (perhaps) wealth, it may be possible to show that the disproportion results from discriminatory practices in violation of the Equal Protection Clause and/or federal and state civil rights laws. See §§III.A, B, and D.

B. CORPORAL PUNISHMENT AND SIMILAR ABUSES

The Supreme Court has made it difficult to challenge corporal punishment in federal court. Most states permit its use, so long as it is "reasonable," although it has been banned in a few states, many cities, and most other countries. Where corporal punishment is permitted, excessive instances can be challenged in state civil suits (e.g., for assault and battery), by filing criminal charges, and/or by seeking disciplinary sanctions against the offending school officials. Background and policy information useful in mounting a broader challenge to corporal punishment is also found below.

Federal Challenges

The Supreme Court has eliminated most, but not all, federal constitutional challenges to corporal punishment in schools. In Baker v. Owen, 432 U.S. 907, aff'g 395 F.Supp. 294 (M.D.N.C. 1975), the Supreme Court summarily affirmed, without opinion, the holding that parental approval of corporal punishment is not constitutionally required.

In Ingraham v. Wright, 430 U.S. 651 (1977), the Court held, first, that the Eighth Amendment, which prohibits cruel and unusual punishment, applies only to punishments imposed as part of the criminal process (and, perhaps, closely analogous punishments, such as punishments imposed upon those confined to mental or juvenile institutions), and thus does not apply to punishment in school.

Second, the Court held that the Due Process Clause does protect against unjustified intrusions on physical security, that corporal punishment of students deprives students of their liberty interest in freedom from physical restraint and infliction of physical pain, and that students are therefore entitled to procedural due process. The Court declared, however, that sufficient procedural protection is provided by students' right to sue for damages and/or press criminal charges for assault and battery in state court if the punishment is excessive under state law, and that therefore the due process interest does not entitle students to notice and hearing. The Court's reasoning has been widely criticized. See §X.J.

a. Substantive Due Process

The Court in Ingraham, however, did not address the claim that specific instances of corporal punishment may be so excessive that they violate the student's right to substantive due process (although the court seems to assume that corporal punishment is not unconstitutional per se). The lower court had held against plaintiffs on this claim, 525 F.2d 909, 917 (5th Cir. 1976), but the Supreme Court specifically refused to decide this issue. 430 U.S. at 659 n.12, 679 n.47. See also 430 U.S. at 689 n.5 (J. White, dissenting).

In Hall v. Tawney, 621 F.2d 607, 611 (4th Cir. 1980), the court disagreed with the lower court in Ingraham and held that specific instances of corporal punishment can give "rise to an independent federal cause of action to vindicate substantive due process rights." The court stated, id. at 613:

> Mindful that not every state law tort becomes a federally cognizable "constitutional tort" under § 1983 simply because it it is committed by a state official, . . . we do not find the substance of this right in the parallel right defined by state assault and battery law. Instead, we find it grounded in those constitutional rights given protection under the rubric of substantive due process in such cases as Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forcible use of a stomach pump by police); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) ("reckless" pistol shooting of suspect by police); and Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (unprovoked beating of pretrial detainee by guard): the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. The existence of this right to ultimate bodily security -- the most fundamental aspect of personal privacy -- is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible.
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> * * *
>
> In the context of disciplinary corporal punishment in the public schools, we emphasize once more that the substantive due process claim is quite different than a claim of assault and battery under state tort law. In resolving a state tort claim, decision may well turn on whether "ten licks rather than five" were excessive, see Ingraham v. Wright, 525 F.2d at 917, so that line-drawing this refined may be required. But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally

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shocking to the conscience. See Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.). Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

b. Discriminatory Corporal Punishment

Some schools have a clear policy or practice of never administering corporal punishment to females. In terms of race, policies are rarely if ever so clear-cut, but there is a large disparity nationwide in the rates of corporal punishment for black students and white students, and this disparity may be the product of racial discrimination. See, e.g., Hawkins v. Coleman, 376 F.Supp. 1330 (N.D.Tex. 1974), where the court held that the higher rate of corporal punishment for black students in Dallas was caused at least in part by "personal racism," "institutional racism," and the school system's functioning as a "white-controlled institution." The legal standards for establishing race, sex, or national origin discrimination under the Equal Protection Clause and various federal civil rights statutes are discussed in §III. See also §VI.C, "Equal Protection."

State Constitutions

There has been little exploration of whether there are some states in which a state court might take a stronger view of the "cruel and unusual punishment" clause or other clauses in its state constitution than the Supreme Court has taken in regard to the federal constitution, thereby striking down the use of corporal punishment in that state.

Ultra Vires and Tort Law (Assault and Battery, Etc.)

Where state statutes or state common law authorize corporal punishment, the statutes or the common law (as interpreted by courts) generally requires that its use must be reasonable, not excessive, and commensurate with the seriousness of the offense. (State statutes may also contain a variety of other safeguards and requirements, such a parental consent, witnesses, or conferences.) Where corporal punishment exceeds these state imposed limits, it is ultra vires -- beyond the power of school officials -- and it may be possible to get equitable relief, such as injunctions. (See §VI.A.)

In such cases, the particular school officials may also be liable for damages in tort actions, such as assault and battery, negligence or intentional infliction of mental distress. The statute of common law which authorizes corporal punishment thereby creates an exception to what would otherwise be civil assault and battery, but only within those limits of "reasonableness." In assessing "reasonableness," the Restatement of Torts, Second, §150 (1965), states that the factors to be considered include, but are not limited to:

(a) whether the actor is a parent;
(b) the age, sex, and physical and mental condition of the child;
(c) the nature of his offense and his apparent motive;
(d) the influence of his example upon other children of the same family or group;
(e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
(f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

Many civil assault and battery cases for damages have been brought in various states, particularly since Ingraham pointed in the direction of state law remedies. See Table of Cases at the end of this section.

The Last ? Resort, the newsletter of the Committee to End Violence Against the Next Generation, often reprints newspaper clippings of unreported, out-of-court settlements paid to students for certain punishments. See for example, Vol. 5, No. 4 (Mar./Apr. 1977), concerning cases of teachers' snipping off a tuft of a student's afro while speaking of "white power" ($3000, Lenoir, N.C., page 1); teacher who forced student to strip in search for missing money ($4000, Buhl, Minn., page 12); shutting retarded elementary school student in "behavior modification" box ($15,000, Butte Mont., page 12); teacher who paddled 16-year-old three times (undisclosed amount, Kettle Falls, Wash., page 12).

In establishing tort liability, it can be helpful to show that the staff member violated the local district's own rules, which will indicate that the action was not a reasonable exercise of lawful authority. See McKinney v. Greene, 379 So.2d 69 (La.App. 1980). See also §V.E, "School's Failure to Follow Its Own Rules." In some states, however, it may be necessary to demonstrate that the rule which was broken was designed to avoid the kind of injury which occurred and/or that the injury would not have occurred if the rule had been followed. See Streeter v. Hundley, 580 S.W.2d 283 (Mo. 1979).

Criminal Actions (Criminal Assault and Battery, Etc.)

In most states, school officials are excused by statute or common law from what would otherwise be an assault and battery against students, provided that the corporal punishment is "reasonable." In a few states, the standard is that the punishment be without malice and cause no permanent injury. In some states, corporal punishment is banned altogether. School officials who exceed the level excused by state law may be prosecuted for criminal assault and battery. See the lengthy list in the Table of Cases at the end of this section.

School Discipline of Staff Who Exceed Limits

Courts have regularly upheld school boards' disciplining or firing of staff members who were found to have exceeded their authority in administering corporal punishment -- either by going beyond the level authorized by state law or by violating local school district regulations. See Table of Cases.

Policy Considerations

School systems should not be able to silence demands for bans on corporal punishment by pointing to the Supreme Court's determination that it is constitutional. The courts have based their reluctance to declare corporal punishment illegal per se upon a deference to the discretion and educational judgment of school officials, and not upon the courts' independent judgment of the merits of corporal punishment. School systems therefore have an educational responsibility to seriously address the non-legal case against corporal punishment.

In medical, psychological, educational, and human terms, the consensus of those who have studied the issue is clear -- corporal punishment is neither necessary nor useful and is in fact counterproductive. Summaries of the numerous studies which have been undertaken are contained in some of the resource material listed below. After examining the issues, various professional organizations have issued policy statements condemning the use of corporal punishment in the schools, including the American Psychological Association, the National Education Association, and the American Public Health Association.

While the schoolroom is the one place where physical punishment by public officials is still permitted in this country, it is the place where its use is most inappropriate, for its underlying premises run counter to all major theories of learning and development. It engenders levels of fear, anxiety, and humiliation which make learning more unlikely. It provokes hostility which leads students to shut the school out. It conveys the message that the school has nothing to teach -- by indicating that real understanding and communication is useless or impossible and by resorting to a mode of communication (physical coercion) which the children themselves have been expected to outgrow. In short, corporal punishment is a form of violence which has no place in the classroom.

Other reasons often given in making the case against corporal punishment include the following:

-it correlates significantly with school vandalism rates;
-it brutalizes the child and has been shown to have a heavy correlation with adolescent and adult delinquency and violence;

- it sanctions child abuse at home;
- it masks the causes of the school's disciplinary problems;
- it is poor preparation for adult democratic participation;
- it falls heavily upon those who do not conform to school expectations, thus placing retarded, learning disabled, and emotionally disturbed children most at risk of being hit;
- it falls most heavily on blacks and poor whites, thus perpetuating differing educational practices and programs based on race and class;
- it easily becomes the first, rather than the last, resort;
- it cannot be justified as an extension of parental discipline, since the deep, individual emotional committment is generally missing (which is not to condone corporal punishment by parents);
- it can easily result in permanent damage to the back, the nervous system, and internal organs even when the student is not externally scarred;
- it has long been banned in most other countries.

Further, there are demonstrated alternatives to the use of corporal punishment, as is amply documented by the resource material below. See also the National Education Association's list of examples reprinted in §XIII.B, "Alternatives."

Finally, evidence that corporal punishment is not necessary and that other equally viable means of carrying out school functions are available is found in the fact that corporal punishment has been banned not only in most other countries, but also in the states of Maine, Massachusetts, New Jersey, and the District of Columbia, as well as in many individual school systems, large and small, e.g., Atlanta, Chicago, New Orleans, New York City, Pittsburgh, Providence, San Francisco, and many small and rural districts.

Where it is not possible to obtain a consensus for abolishing corporal punishment, procedural and other safeguards become the logical focal point. These may take the form of requiring parental permission in writing, limiting the individuals who may impose it, requiring informal hearings, requiring the presence of witnesses, limiting the permissable amount of punishment and the method for administering it, requiring that specific alternatives be attempted first, etc. A number of states have passed statutes containing various of these provisions, as have many local systems. For instance, written parental permission is required prior to imposing corporal punishment in California (Ed. Code §§49000-49001), while in Illinois, districts which use it must notify parents, who can inform the school that it shall not be used (state board of education regulation). See Table of Statutes at the end of this section.

With the exception of requiring parental consent, however, the degree to which procedural safeguards can be relied upon may be questionable.

Due-process type procedures rest upon a respect for the integrity of the individual, and it may therefore be contradictory to expect that the respect necessary for actual enforcement of such safeguards can be found in a school system which has a policy of violating students' physical integrity. Abuses, including lasting physical injury, become almost inevitable, since corporal punishment is more frequently chosen as the means of discipline as the teacher's or adminstrator's level of frustration and anger rises. Justice Blackmun, while sitting as an appeals judge, made a similar point in the prison context. The lower court had issued a decree against the use of the strap in prisons until there were adequate safeguards. His decision vacated the decree and held instead that the strap could not be used under any circumstances:

> Our reasons for this conclusion include the following: (1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. The present record discloses misinterpretation even of the newly adopted January 1966 rules. (2) Rules in this area seem often to go unobserved. . . . (3) Regulations are easily circumvented. . . . (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. (6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissable from that which is cruel and unusual? [In the school context, substitute illegal for "cruel and unusual" in the last two sentences. The court goes on to cite substantive reasons for banning the strap.] Jackson v. Bishop, 404 F.2d 571, 579-80 (8th Cir. 1968).

Resources

Good sources of information on corporal punishment and similar abuses include:

Center for Law and Education, Inequality in Education, Number 23 (1978) (a special issue devoted to corporal punishment, including theoretical and practical overviews, anecdotal and statistical information on the use of corporal punishment in American schools, a critique of the Supreme Court's reasoning in Ingraham, a survey of state law remedies and court decisions, a survey of the effects of eliminating corporal punishment in various school systems, and an analysis of Office for Civil Rights survey information showing racial and sexual disparities in corporal punishment);

Committee to End Violence Against the Next Generation (EVAN-G) (977 Keeler Avenue, Berkeley, CA 94708);

The Last ? Resort (a bi-monthly magazine published by EVAN-G, which contains recent developments on corporal punishment, including court cases, out-of-court settlements, state legislative news, social science and medical reports, and anecdotes);

Adah Maurer, *Corporal Punishment Handbook* (Generation Books, 1978) (available from EVAN-G; useful for parents seeking to get corporal punishment abolished in their district, with material on history, questionable defenses, arguments, scientific evidence, discipline and disruption, and alternatives);

National Center for the Study of Corporal Punishment and Alternatives in the Schools (822 Ritter Hall South, College of Education, Temple University, Philadelphia, PA 19122) (conducts studies and surveys of corporal punishment, and has an extensive publications list);

I.A. Hyman and J.H. Wise, *Corporal Punishment in American Education: Readings in History, Practice, and Alternatives* (Temple University Press, Philadelphia, 1979) (available from the National Center above);

Discipline (the ongoing journal of the National Center for the Study of Corporal Punishment and Alternatives in the Schools);

National Education Association, *Report of the Task Force on Corporal Punishment* (1972) (NEA, 1201 Sixteenth St. N.W., Washington, D.C. 20036) (establishes NEA's official position, as the largest teacher organization in the country, against corporal punishment, reviews studies, critiques arguments for corporal punishment, and lists good alternatives);

National Institute of Education, *Proceedings: Conference on Corporal Punishment in the Schools: A National Debate* (Washington, D.C. 1977);

George E. Stevens, "Verbal Chastisement in Elementary and Secondary Schools: A Suggestion," 6 *Journal of Law and Education* 319 (July 1979) (constructs legal argument for making school staff liable for verbal abuse of students under a "reasonableness" standard similar to the standard for corporal punishment);

John R. Cryan and Jamie C. Smith, "The Hickory Stick: It's Time to Change the Tune," 62 *Phi Delta Kappan* 433 (February 1981).

Chart and Table of Cases and Statutes

State Law and the Status of Corporal Punishment in the Schools

The Burger Court has frequently indicated a preference for state remedies wherever possible. This preference took its toll in *Ingraham v. Wright*, where the court determined that a student's legal remedy following a severe beating could be found only in state courts. This gives new importance to research on state law, as it becomes helpful to survey the states when dealing with a problem such as corporal punishment. The following chart and table of cases provide such a survey. *This chart and table of citations was prepared by Patricia M. Lines, with assistance from Robert Beckerman of the American Civil Liberties Union, Washington State Chapter.*

How To Use This Chart and Table of Cases and Statutes

The chart on this page lists all fifty states, the District of Columbia, and Puerto Rico. Symbols in the horizontal rows indicate the existence of cases or state statutes providing for restrictions on a school official's tort liability when administering corporal punishment (sections IA and IB); the existence of statutory authorization in the school code (sections IIA through IID); the existence of case law setting forth limits on the criminal liability of school officials (section IIIA); and the existence of a statute in the criminal code providing for justification (an excuse) when a school official physically punishes a student (section IIIB).

The accompanying table (see pages 54-56) provides citations to the case law or statutes referred to by a ▲ on this chart. Where a ● appears on the chart, the table will also contain some parenthetical information with the citation for the appropriate state, showing how its law differs from the others in that category. Section numbers on the chart correspond to section numbers in the table. **Example:** An attorney with a potential claim in Alabama can determine from the chart that there is precedent in that state that a plaintiff must establish malice or permanent injury to recover civilly. By reading horizontally across section IB, one notes that there is similar precedent in Illinois and North Carolina. Citations to those cases would be found in section IB of the table. Thus, the table can help focus the research on out-of-state cases, where this is deemed helpful. The chart also permits identification of states with similar statutes (see section II, for example).

The significance of the various standards of liability and presence or absence of statutory authorization are discussed in the accompanying article by Patricia M. Lines which begins on page 37

CODE: (▲) A case or statute exists and is cited in the accompanying Table.
(●) Citation appears in the accompanying Table, with additional distinguishing information.

	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	District of Columbia	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri
I. CIVIL TORT LIABILITY: Standard for Liability																										
A. punishment must be unreasonable			▲	▲			▲			●	●				▲	▲		▲	▲	●		●	●			▲
B. punishment must be with malice or cause permanent injury	▲													●												
II. STATUTORY AUTHORIZATION (Does state law authorize school personnel to corporally punish children?)																										
A. authorizes teachers and/or principals								▲				●						●					▲			
B. authorizes teachers, principals and others										▲					▲											
C. authorizes school district		●			●						▲										●					
D. expressly forbids corporal punishment									●											▲	●	▲				
III. CRIMINAL LIABILITY A. Standards for Liability																										
1. corporal punishment must be unreasonable			▲	▲	▲							▲		▲	▲	▲		●								▲
2. corporal punishment must be with malice or cause permanent injury	▲													●												
B. Does the state have a justification statute?			▲	▲		▲	▲	▲		▲	▲	▲							▲	●			●	▲		

	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Puerto Rico	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
I. CIVIL TORT LIABILITY: Standard for Liability																										
A. punishment must be unreasonable		▲		▲						▲		▲	▲					▲	●		▲					
B. punishment must be with malice or cause permanent injury								▲																		
II. STATUTORY AUTHORIZATION (Does state law authorize school personnel to corporally punish children?)																										
A. authorizes teachers and/or principals	▲						●	▲			●		●									▲				
B. authorizes teachers, principals and others										▲							▲				▲					
C. authorizes school district			●											●		▲										
D. expressly forbids corporal punishment					▲																					
III. CRIMINAL LIABILITY A. Standards for Liability																										
1. corporal punishment must be unreasonable		●					▲											▲	▲							
2. corporal punishment must be with malice or cause permanent injury								▲		▲			▲													
B. Does the state have a justification statute?	▲						▲				▲	▲	▲				▲		▲	▲			▲			●

Table of Cases and Statutes
State Law and the Status of Corporal Punishment in the Schools

NOTE: This Table is a supplement to the article "Corporal Punishment after Ingraham: Looking to State Law," which appears in Inequality in Education #23 (Sept. 1978). It is to be used in conjunction with the chart which appears on the preceding page.

I. CIVIL TORT LIABILITY

A. Punishment must be unreasonable.

ARIZ.: LaFrentz v. Gallagher, 105 Ariz. 255, 462 P. 2d 804 (1969) (for def.); **ARK.:** Berry v. Arnold School Dist., 199 Ark. 118, 137 S.W.2d 256 (1940) (for pupils) (teacher discharge); **CONN.:** Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958) (for defendant); Calway v. Williamson, 130 Conn. 575, 36 A. 2d 377 (1944) (for pupil; sitting on pupil's abdomen excessive); O'Rourke v. Walker, 102 Conn. 130, 128 A.25 (1925) (for defendant); Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1855) (for defendant); Swainbank v. Coombs, 115 A. 2d 408 (Super. Ct. Conn. 1955) (case against board dismissed because of its immunity, case against principal sustained); **FLA.:** *Cf.*, Fla. Stat. Ann. §232.275 (1976) (no tort liability except in case of "excessive force or cruel and unusual punishment"); **GA.:** Ga. Code Ann. §32-837 (1976) (no tort liability if punishment is authorized by board, administered in good faith, is not "excessive or unduly severe" and administered with another adult present and meets the other procedural requirements of §32-836 (Supp. 1977);**IND.:** Cooper v. McJunkin, 4 Ind. 290 (1853) (summary judgment for defendant, rev'd and rem'd). *Cf.* Indiana State Personnel Board v. Jackson, 244 Ind. 321, 192 N.E. 2d. 740 (1963) (teacher dismissal action, institutional setting, teacher reinstated); **IOWA:** Tinkham v. Kole, 252, Ia. 1303, 110 N.W. 2d 258 (1961) (for student); **KY.:** Carr v. Wright, 423 S.W. 2d 521 (Ky. 1968) (judgment for student, remanded to decide reasonableness); Hardy v. James, 5 Ky. 36 (1872) (judgment for student, aff'd); **LA.:** Roy v. Continental Ins. Co., 313 So.2d 349 (La. Ct. of App. 1975) (for defendant); Johnson v. Horace Mann Mutual Ins. Co., 241 So.2d 588 (La. Ct. of App. 1970 (for pupil); Frank v. Orleans Parish School Board, 195 So. 2d 451 (La. Ct. of App. 1967) (for student, punishment excessive), *cert. refused*, 250 La. 635, 197 So.2d 635 (1967); *Cf.*, Houeye v. St. Helena Parish School Bd., 223 La. 966, 67 So.2d 553 (1953) (teacher dismissal, upheld); Watts v. Winn Parish School Bd., 66 So.2d 350 (La. Ct. of App. 1953) (teacher dismissal, reinstatement); **ME.:** Patterson v. Nutter, 78 Me. 509, 7 A. 273 (1886) (student obtained new trial) (now banned by statute, see *infra*); **MASS.:** Commonwealth v. Randall, 70 Mass. 36 (1855) (guilty verdict sustained) (now banned by statute, see *infra*); **MICH.:** *Cf.*, Mich. Stat. Ann. §15.41312 (2) (3) (1976) (provides for no liability in civil actions for "proper" discipline of child, unless there is gross abuse or disregard for health and safety of pupil); **MO.:** Christman v. Hickman, 225 Mo. App. 828, 37 S.W.2d 672 (1931) (judgment for plaintiff, rev'd and rem'd because of ambiguous instructions); Haycraft v. Grigsby, 88 Mo. App. 354, *on appeal*, 94 Mo. App. 74, 67 S.W. 965 (1901) (judgment for defendant, aff'd); **NEB.:** *Cf.* Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903) (*dicta*, case against aunt); **N.H.:** Wilbur v. Berry, 71 N.H. 619, 51 A. 904, (1902) (judgment for defendant aff'd); Heritage v. Dodge, 64 N.H. 297, 9 A. 722 (1886) (same); **OHIO:** Poole v. Young, Cleveland Municipal Ct. No. A 613952 (1962) (unreported) (cited in

Dugan, *Teacher's Tort Liability*, 11 Cleve. Mar. L. Rev. 512, 518 (1962); **ORE.:** Simms v. School Dist. No. 1, 13 Or. App. 119, 508 P. 2d 236 (1973) (for defendant); **PA.:** Harris v. Galilley, 125 Pa. Super., Ct. 505, 189 A. 779 (1937); Rupp v. Zinter, 29 Pa. D & C 625 (1937) (verdict for plaintiff, aff'd, permanent injury is evidence of unreasonableness); Guerrieri v. Tyson, 147 Pa. Super. Ct. 239, 24 A. 2d. 468 (1942) *dicta*, teacher injured child in clumsy attempt to treat infection); **TENN.:** Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944) (case dismissed, aff'd); **TEX.:** *Cf.*, Prendergast v. Masterson, 196 S.W. 246 (Civ. App. 1917) (criminal justification statute controlling) (for plaintiff); Melen v. McLaughlin, 107 Ut. 111, 176 A.297 (1935) (for student); **VT.:** Lander v. Seaver, 32 Vt. 114, 10 Vt. R. 42 (1859) (for teacher).

B. Punishment must be with malice or cause permanent injury.

ALA.: Suits v. Glover, 71 So.2d 49 (1954) (for teacher); **ILL.:** *Cf.*, Gordon v. Oak Park School Dist., 24 Ill. App. 3rd 131, 320 N.E.2d 389 (1974) (summary judgment for defendant, aff'd) (This case is contrary to a criminal case decided by the Illinois Supreme Court, see *infra*); City of Macomb v. Gould, 104 Ill. App. 2d 361, 244 N.E.2d 644 (1969) (same); (Drake v. Thomas, 310 Ill. App. 57, 33 N.E. 2d 889 (1941) (same); **N.C.:** Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904) (for pupil).

II. STATUTORY AUTHORIZATION

A. School code authorizes teachers and/or principals to corporally punish.

Del. Code Ann., Tit. 14 §701 (Supp. 1976); Haw. Rev. Stat. § 298-16 (Supp. 1975) (corporal punishment banned except as provided in § 703-309 (2)); the cross-referenced section, § 703-309(2) (Supp. 1975) is a criminal justification statute, following the model penal code. Note that Hawaii Attorney General has found the statutory scheme vague and the state Department of Education is advising against its use. Letter from Randall Y. Iwase, Deputy Attorney General, to Charles G. Clark, Superintendent of Education, April 27, 1976.

Cf., Ky. Rev. Stat. Ann. §161.180 (Baldwin 1976) (giving teachers authority to hold pupils to "strict account," OAG 60-553 rules that this sanctions corporal punishment); Mich. Stat. Ann. §15.41312(2) (1976); Mont. Rev. Code Ann., §75-6109 (1971); *Cf.*, N.Y. Penal Law §35.10 (McKinney 1975) (held to be adequate authority by Op. Comm'r Educ., 14 Educ. Dept. Rptr. 139 (1974); N.C. Gen. Stat. 115-146 (1975) (to restrain or correct); *Cf.*, Okla. Stat. Ann., tit. 70, §6-114 (West 1972) does not mention corporal punishment; gives school personnel same right as parent to control or discipline a child); *Cf.*, 24 Penn. Cons. Stat. Ann.§13-1317 (Purdon, supp. 1976-77 (same); Va. Code §22.231.1 (1973) (reasonable, in good faith, not excessive).

B. School code authorizes teachers, principals and other school personnel to corporally punish.

Fla. Stat. Ann. §232.27 (1976) ("teacher or other member of the staff of any school"); see also Fla. Stat. Ann. §232.23 (6)(c)(1977) (school board shall not have authority to forbid corporal punishment); Ind. Code Ann. §20-8.1-5.2(a)(1975) (all school personnel); Ohio Rev. Code Ann. §3319.41 (Page 1972) (teacher, principal, administrator, non-certified employees and bus drivers); S.D. Compiled Laws Ann. §13-32-2 (1975) (teachers, principals, administrators and bus drivers); 16 Vt. Stat. Ann. §1164 (1974) teacher or principal, or superintendent or school director on request of and in the presence of the teacher, for purpose of serving obedience or for correction, or to secure order).

C. School Code authorizes school district to make rules regarding corporal punishment, and there must be local district rules authorizing it before anyone can corporally punish a child.

Cf. Alaska: Regulations but not statute provide the authority: 4A.A.C. 07.010; Cal. Reorg. Educ. Code §49000-49001 (West 1977) (local option, prior parental written approval required); Geo. Code Ann. §32-835 (1976); Md. Educ. Code Ann. §98-B (1975) (authorized in some counties only); Nev. Rev. Stat. §392.465 (1973) (only as a last resort for disciplinary purposes; also other limitations); 18 Laws P.R. §250 (1975) (only if pursuant to state regulations and "upon the sanction of the parent or guardian"); S.C. Code §59-63-260 (1976)

D. School Code expressly forbids corporal punishment.

Cf. District of Columbia, Register Board of Education Rules and Regulations, §423 (1977) (forbids corporal punishment by regulation); Me. Rev. Stat., tit. 17A, §106(2)(1976) (see discussion in Lines article at p.46); Md. Educ. Code §98B (1975) (authorized in some counties, banned in others); Mass. Gen. Laws, ch. 71, §37(G) (West Supp. 1976-77); N.J. Stat. Ann. §18A:6-1 (West 1968).

III. CRIMINAL LIABILITY

A. Standards for liability under common law rule or statute.

1. Punishment must be unreasonable.

ARIZ.: *Cf.* State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965) (case against parents); **ARK.:** Dodd v. State, 94 Ark. 297, 126 S.W. 834 (1910) (conviction reversed); **CAL.:** People v. Curtiss, 116 Cal. App. 771, 300 P. 801 (1931) (conviction aff'd); **HAWAII:** Territory v. Cox, 24 Haw. 461 (1918) (see subsequent justification statute, *infra*); **ILL.:** People v. Ball, 58 Ill.2d 36, 317 N.E.2d 54 (1974) (overruling prior criminal cases which required malice or permanent injury; **IND.:** VanVactor v. State, 113 Ind. 276, 15 N.E.2d 341 (1868) (guilty verdict, rev'd and rem'd); See also Marlsbury v. State, 10 Ind. App. 21, 37 N.E. 558 (1813)(same); State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888) (acquittal, rev'd and rem'd); Danenhoffer v. State, 69 Ind. 295 (1879) (guilty verdict, rev'd and rem'd); Gardner v. State, 4 Ind. 632 (1853)(same); **IOWA:** State v. Davis, 158 Ia. 501, 139 N.W. 1073 (1913) (for student); State v. Mizner 50 Ia. 145 (1878)(same); **KY.:** *Cf.* Owens v. Commonwealth, 473 S.W.2d 827(1971)(conviction rev'd; need instruction on teacher's right to self defense in this case); **MO.:** State v. Boyer, 70 Mo. App. 156, (1897) (conviction on one count, acquittal on one count, aff'd); **NEB.:** *Cf.* Fisher v. State, 154 Neb. 166, 47 N.W.2d 349 (1951) (*dicta*, case against parent); **N.Y.:** People v. Baldini, 4 Misc.2d 913, 159 N.Y.S.2d 802 (City Ct. 1957) (for teacher); People v. Newton, 185 Misc. 405, 56 N.Y.S.2d 779 (1945) (City Ct. 1945) (same); People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d.699 (county ct. 1944) (same); People v. Petrie, 120 Misc. 221, 198 N.Y.S. 81 (county ct. 1923); **TENN.:** Anderson v. State, 40 Tenn. 455 (1859) (guilty verdict upheld); **TEX.:** Harwell, v. State, 96 Tex. Crim. 536, 258 S.W. 814 (1924) (conviction upheld); Harris v. State, 83 Crim. 468, 203 S.W. 1089 (1918) (conviction upheld); Ely v. State, 68 Tex. Crim. 562, 152 S.W. 631 (1912) (conviction overturned); Greer v. State, 106 S.W. 359 (Tex. Crim. 1907)(conviction overturned); Stephens v. State, 44 Tex. Crim. 67, 68 S.W. 281 (1902)(same); Howerton v. State, 43 S.W. 1018 (Tex. Crim. 1898) (conviction sustained); Thomason v. State, 43 S.W. 1013 (Tx. Crim. 1898) (conviction overturned); Kinnard v. State, 35 Tex. Crim. 276, 33 S.W. 234 (1895)(conviction sustained); Whitley v. State, 33 Tex. Crim. 172, 25 S.W. 1072 (1894)(same); Spear v. State, 25 S.W. 125 (Tex. Crim. 1894) (same); Smith v. State, 20 S.W. 360 (Tex. Crim. 1892) (same); Hutton v. State, 23 Tex. App. 386, 5 S.W. 122 (1887) (conviction overturned); Metcalf v. State, 21 Tex. App. 174, 17 S.W. 142 (1886)(same); Bell v. State, 18 Tex. Crim. 53 (1885) (conviction sustained); Dowlen v. State, 14 Tex. App. 61 (1883)(conviction overturned); *Cf.*, Dill v. State, 87 Tex. Crim. 49, 219 S.W. 481 (1920)(student's right to self-defense); Wilson v. State, 80 Tex. Crim. 442, 190 S.W. 155 (1917)(same); Bolding v. State, 23 Tex. Crim. 172, 4 S.W. 579 (1887)(student's conviction aff'd); Stanfield v. State, 43 Tex. 167 (1875)(guardian).

2. Punishment must be with malice or cause permanent injury.

ALA.: Roberson v. State, 22 Ala. App. 413, 116 So. 317 (1928) (conviction set aside); Holmes v. State, 39 So. 569 (Ala. 1905) (conviction aff'd); Boyd v. State, 88 Ala. 169, 7 So. 268 (1889) (conviction aff'd); **ILL.:** People v. DeCarr 17 Ill. App. 3d 553, 308 N.E.2d 196 (1974) (case decided in February, overruled by *People v. Ball*, decided in September of same year, see *supra*); Fox v. People, 84 Ill. App. 270 (1899) (overruled, see *People v. Ball*); **N.C.:** State v. Thornton, 136 N.C. 610, 48 S.E. 602 (1904) (conviction aff'd); State v. Long 117 N.C. 791, 23 S.E. 431 (1895) (conviction set aside and new trial ordered); State v. Stafford, 113 N.C. 635, 18 S.E. 256 (1893) (conviction affirmed); State v. Pendergrass, 19 N.C. 365, 31 Am. Dec. 416 (1973) (conviction set aside); **OHIO:** State v. Lutz, 65 Abs. 402, 113 N.E. 2d 757 (Ct. Com. Pleas 1953) (for teacher); Martin v. State, 11 Ohio. N.P. (n.s.) 183, 21 Ohio Dec. 520 (1910) (judgment for plaintiff, rev'd and rem'd) *aff'd without opinion*, 87 Ohio St. 459, 102 N.E. 1132 (1910) (requiring permanent injury *and* malice); **PA.:** Commonwealth v. Ebert, 11 Pa. Dist. 199, 3 Justice's L.R. 252 (1901) (for teacher); Commonwealth v. Seed, 5 Clark 78 (Pa. 1851) (same).

B. The State has a Justification Statute that covers school personnel. Greater detail on statutes is provided in the text of accompanying article by P.M. Li[illegible]es.

13 Ariz. Rev. Stat. Ann. §13-246 (1956) (moderate restraint); Ark. Stat. Ann. §41-505 (1) (Supp. 1976) (reasonably necessary to maintain discipline or promote welfare of child; Colo. Rev. Stat. §18-1-703 (a) (1973) (same); Conn. Gen. Stat. §53a-18 (1977) (same); Del. Code Ann., Tit. 11, §468 (2) (supp. 1976) (must be necessary to special function); Fla. Stat. Ann. §232.275 (1976) (unqualified); Geo. Code Ann. §32-836 & 837 (1976) (see civil tort liability, same statute); Haw. Rev. Stat. §703-309(2) (Supp. 1975) (must be necessary to special function); La. Rev. Stat. Ann. §14.18(4) (must be reasonable); *Cf.* Me. Rev. Stat., tit. 17A §106(2) (1976)(limits justification to that force necessary to control disturbing behavior; corporal punishment is not justified); *Cf.* Mich. Stat. Ann. §15.41312(2) & (3)(1976)(providing for rules in civil liability only, this probably does not preempt criminal common law); Minn. Stat. Ann. §609-06(6) (West 1964) (must be to restrain or correct); Mont. Rev. Codes Ann. §94-3-107 (1973) (same); N.Y. Penal Law §35.10 (McKinney 1975) (must be to promote welfare of child or to maintain discipline); Okla. Stat. Ann., tit. 21, §643(4) (West 1958)(to restrain or correct); Ore. Rev. Stat. §161.205(1) (1975) (to maintain order in classroom); Pa. Cons. Stat. Ann. Title 18, §509 (1973)(must be necessary to special function); S.D. Compiled Laws §22-18-5 (Special Supp. 1977) (to restrain or correct) (note the authorization to teachers and other school personnel had been deleted for a short period of time, see Supp. 1976); Tex. Penal Code Ann. §9-62(1974) (for special purpose or to maintain discipline): Utah Code Ann. §76-5-102 (Supp. 1975) (to maintain reasonable discipline); Wash. Rev. Code §9A.16.020(4) (1976) (to restrain or correct); See also Wash. Rev. Code §28A.87.140 (1970) (misdemeanor to maltreat or abuse pupil, or inflict punishment "on the head of a pupil"). *Cf.* 1977 Wyo. Sess. Laws ch. 99 (to be compiled as §669.2)(makes it a crime to "intentionally or in reckless disregard of the consequences cause violent physical injury or mental trauma to a child under the age of sixteen (16) or commit any assault or assault and battery upon the child to a degree as to require medical, psychological or psychiatric treatment....")

ADDENDUM

NEW CASES SINCE PUBLICATION OF ABOVE TABLE OF CASES

Civil Tort Liability

Sansone v. Bechtel, 429 A.2d 820 (Conn. 1980) (for pupil);
Williams v. Cotton, 346 So.2d 1039 (Fla.App. 1977) (for pupil; teacher used excessive force, resulting in negligence);
Baikie v. Luther High School South, 366 N.E.2d 542 (Ill.App. 1977) ($25,000 for pupil; willful and wanton assault and battery by teacher);
Eversole v. Wasson, 398 N.E.2d 1246 (Ill.App. 1980) (student could bring action against school district for actions of teacher in threatening, berating, and striking her at school because, even though teacher was confronting student about a personal matter unrelated to school, the school has a special relationship to students requiring the school to protect them);
Thompson v. Iberville Parish School Board, 372 So.2d 642 (La.App. 1979) (for teacher);
White v. Richardson, 378 So.2d 162 (La.App. 1979) (for teacher);
McKinney v. Greene, 379 So.2d 69 (La.App. 1980) (for pupil; where school rule limited corporal punishment in normal circumstances to use of a paddle, with an exception for reasonable force to restrain a student from attacking another, teacher's kicking student lightly after student ignored order to stop fighting another student was held unreasonable in that teacher could have used less offensive means);
LeBlanc v. Tyler, 381 So.2d 908 (La.App. 1980) (for teacher);

Streeter v. Hundley, 580 S.W.2d 283 (Mo. 1979) (for teacher; violation of school system's rule is not negligence *per se* where the purpose of the rule was not to avoid the sort of injury which occurred here; punishment here was reasonable);
Hogenson v. Williams, 542 S.W.2d 456 (Tex.Civ.App. 1976) (for student; football).

Criminal Liability

People v. Hartley, 317 N.E. 2d 57 (Ill. 1974)(conviction upheld)
People v. Smith, 335 N.E.2d 125 (Ill.Dist.Ct.App. 1975) (injuries sufficient to establish that teacher used excessive force; conviction upheld);

People v. Davis, 410 N.E.2d 673 (Ill.App. 1980) (upholding conviction of one school bus driver for use of corporal punishment disproportionate to the "reasonable discipline sufficient to fulfill their duty to maintain safety on the school bus;" remanding conviction of another driver for new trial).

School Discipline of Staff

United States v. Coffeeville Consolidated School District, 513 F.2d 244, 249-51 (5th Cir. 1975) (requiring students to stand touching their toes for lengthy periods may, in certain circumstances, be just cause for firing teacher, regardless of whether or not teacher had previously been warned against the practice);

Wood v. Goodman, 381 F.Supp. 413 (D.Mass. 1974) (upholding suspension of teacher who inflicted corporal punishment contrary to school policy);

Shorba v. Board of Education, 583 P.2d 313 (Haw. 1978) (sustaining dismissal for violating board rule on corporal punishment);

Rolando v. School Directors, 358 N.E.2d 945 (Ill.App. 1976) (upholding dismissal of teacher who used cattle prod to discipline unruly sixth graders, under statute permitting dismissal for cruelty);

Welch v. Board of Education, 358 N.E.2d 1364 (Ill.App. 1977) (teacher dismissal upheld);

Grissom v. Board of Education, 75 Ill.2d 314, 388 N.E.2d 398 (Ill. 1979)(teacher dismissal because of failure to give teacher notice and opportunity to correct remediable conduct);

Allen v. LaSalle Parish School Board, 341 So.2d 73 (La.App. 1977), cert. denied, 343 So.2d 203 (La. 1978) (upholding dismissal of school bus driver; while drivers may have to take some disciplinary action in emergency situations, they are not authorized to impose corporal punishment, since they are not "teachers");

McLaughlin v. Machais School Committee, 385 A.2d 53 (Me. 1978) (dismissal upheld where physical education teacher, who was pushed by student during basketball game, struck student in face with open hand, causing damage; court emphasized importance of teacher's setting an example);

Board of Education v. Shank, 542 S.W.2d 779 (Mo. 1976) (dismissal of permanent teacher upheld on basis of violation of district's corporal punishment regulation);

In re Tenure Hearing of Basil Fattell, 1977 N.J.Sch.L.Dec. 941 (N.J.Ed.Comm'r 1977) (finding that it was not proved that the teacher had used corporal punishment);

In re Tenure Hearing of Samuel Ivens, 1977 N.J.Sch.L.Dec. 961 (N.J.Ed.Comm'r 1977) (corporal punishment severe enough to warrant denial of pay increase but not enough for dismissal);

Bott v. Board of Education, 392 N.Y.S.2d 274 (N.Y.Ct. of Appeals 1977) (upholding finding of teacher misconduct and incompetence for use of excessive force even though the force was not sufficient to constitute a crime);

Clayton v. Board of Education, 423 N.Y.S.2d 548 (N.Y.Sup.Ct., App.Div., 1979) (teacher dismissal upheld);

Barnes v. Fair Dismissal Appeals Board, 548 P.2d 988 (Ore.App. 1976) (dismissal upheld for exceeding local policy, which limited corporal punishment to paddling);

Landi v. West Chester Area School District, 353 A.2d 895 (Pa.Comm.Ct. 1976) (dismissal on statutory ground of cruelty upheld for shaking, pushing, and grabbing student by hair, despite fact that this was a single incident);

Caffas v. Board of School Directors, 353 A.2d 898 (Pa.Comm.Ct. 1977) (dismissal under cruelty statute for physical and verbal abuse of students);

Bovino v. Board of School Directors, 377 A.2d 1284 (Pa.Comm.Ct. 1977) (dismissal of teacher for "cruelty" and "immorality" upheld based on verbal abuse of a student);

Penn-Delco School District v. Urso, 382 A.2d 162 (Pa.Comm.Ct. 1978) (dismissal of teacher upheld based on offer, made within a sexual context, to spank two students);

Board of Public Education v. Pyle, 390 A.2d 904 (Pa.Comm.Ct. 1978) (dismissal upheld based on repeated physical confrontations with students);

Blascovitz v. Board of School Directors, 410 A.2d 407 (Pa.Comm. Ct. 1980) (dismissal of teacher upheld for "cruelty, persistent negligence and persistent and willful violation of school . . . rules" in treatment of students).

Note: Earlier staff discipline cases are found in the "Civil Tort Liability" portion of the preceding Table of Cases.

Other

Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (described under substantive due process discussion above);

Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (availability of state procedures for obtaining compensation for assault and battery of college student by football coach was sufficient to insure that the alleged deprivation of liberty was not without due process of law);

Gary W. v. Louisiana, 437 F.Supp. 1209, 1230 (E.D.La. 1976) ("right to treatment" and education case for institutionalized children; "Corporal punishment shall not be permitted. . . The institution shall prohibit mistreatment, neglect or abuse of any child in any way");

Jackson v. Redmond, C.A. No. 75-C-461 (N.D.Ill. 7/20/76) (consent decree to remedy alleged non-compliance with district rule forbidding corporal punishment, including in-service training, investigation procedures, and provisions for discipline against non-complying staff members);

Burton v. Board of Education, 71 Cal.App.3d 52, 139 Cal.Rptr. 383 (1977) (where state law required written parental permission before corporal punishment could be used, a school district could not require that parents sign consent forms as a condition for admission to its special "fundamental" schools);

Coats v. Cloverdale Unified School District Governing Board, No. 80029 (Cal.Super.Ct., Sonoma County, 1/20/75) (Clearinghouse No. 14,462) (where student was failed in physical education, thereby preventing his graduation, because he refused to run laps around gymnasium as punishment for being on losing side of a volleyball game, court issued writ of mandamus, stating that it appeared that the school had acted beyond its statutory authority and/or violated the student's rights of due process and/or equal protection).

C. ACADEMIC PUNISHMENT (GRADE REDUCTIONS, ETC.); OTHER RESPONSES TO ATTENDANCE OFFENSES

Among the most common disciplinary offenses are tardiness and skipping class. Among the most common responses are policies which provide for grade reductions or loss of credit for these attendance offenses (e.g., reducing the final grade one level for each day missed, giving a zero for each day missed, failing any student who has missed a certain number of classes, or reducing the number of credits given for a course). Sometimes these policies are applied to days missed because of suspension, or even days missed because of illness, as well as to "skips" and other unexcused absences.

This section also addresses two other practices -- (a) suspension or expulsion for attendance offenses and (b) lowering of grades for other disciplinary or basically non-academic reasons (e.g., in retaliation for protected expression). All three types of practice are subject to a variety of legal challenges. Lastly, the distinction between purely academic decisions and disciplinary decisions is discussed.

1. GRADE REDUCTIONS AND LOSS OF CREDIT FOR ATTENDANCE OFFENSES

Unauthorized by Legislature

Lowering of grades or loss of credit for missing classes or tardiness can be challenged, first, on ultra vires grounds by arguing that the legislature has not authorized such a response. This argument often hinges on the existence of state statutes under which the legislature has instead authorized a different response to truancy, such as attendance officer investigations, fines against parents, or juvenile court proceedings. By authorizing one set of responses, the legislature has arguably ruled out other responses. (See second part of the discussion in §VI.A, "Ultra Vires.")

Arbitrary and Unreasonable

Second, such policies are probably ultra vires and in violation of substantive due process and equal protection in that they are arbitrary and unreasonable. (See §VI.A, B, and C.) Grades which are supposed to reflect academic performance -- and which will be viewed as such by colleges and employers -- become artificially lowered for reasons unrelated to the student's academic performance. The arbitrariness is especially evident when a certain number of missed classes results in a total loss of credit so that, e.g., a student with a "B" average and seven cuts receives a "B", while a student with a "B" average and eight cuts receives an "F".

Procedural Due Process Violations

Third, such policies can create procedural due process violations when applied to days missed because of suspension. Suppose, for example, a student is suspended for three days and receives an informal hearing which, under Goss v. Lopez, 419 U.S. 565 (1975), satisfies due process requirements for a normal short-term suspension. If, as a result of the suspension, the student will also accumulate enough "unexcused absences" to reduce his/her grade or fail courses, the penalty is much greater than a short suspension alone, and he/she is arguably entitled to a considerably more formal hearing than he/she in fact received. Jones v. Latexo Independent School District, 499 F.Supp. 223, 239 n.15 (E.D.Tex. 1980). Cf. Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972). (See Procedural Rights, §IX.B, "What Kind of Due Process: Balancing Test;" and §X.A, "Suspension for Ten Days or Less.") A similar analysis should be applied where a student loses credit because he/she is not allowed to make up tests given during the suspension period.

Inaccurate and Misleading Student Records

Fourth, the Family Education Rights and Privacy Act, which protects student records maintained by educational agencies receiving federal funds, requires that school systems develop procedures, including hearing procedures,

> . . . to challenge the content of such student's education records in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein. . . .

20 U.S.C. §1232g(a)(2); 34 C.F.R. §§99.5(a)(5), 99.20-99.22. A statement of Congressional intent, however, explained that the Act was not intended to give students the right to a hearing to challenge teachers' grade assignments, as distinguished from the accuracy with which assigned grades are recorded. "Joint Statement in Explanation of Buckley/Pell Amendment," 120 Congressional Record S.21488 (12/13/74). See also Department of Health, Education, and Welfare interpretation, 41 Fed.Reg. 24666 (6/17/76). On the other hand, the Joint Statement did note that the provision could be used to challenge, for example, inaccurate information or erroneous evaluations used to place or classify students. It could be argued that challenges to grade reduction policies are not challenges to teachers' academic evaluations but instead are attempts to correct "inaccurate" and misleading" changes in those evaluations for disciplinary reasons.

(For more on student records, see §XII.A.)

Showing That the Policy is Disciplinary

The school may attempt to claim that the policy is "academic" and not "disciplinary" at all in that attendance and class participation are important elements of academic performance. This can be countered in a number of ways.

It may be possible to show that the grade reduction is really disciplinary because it is clearly out of proportion to that portion of the course which has been missed, particularly when class participation is itself presumably only a portion of the overall grade. (For instance, assume that class participation counts for, at most, one-third of the grade, and that there are 50 classes per course in a ten week term. Each class missed should then account for no more than 2/3 of 1% of the overall course grade for that term.)

It may also be possible to demonstrate that the class participation justification is a fabrication by showing that in fact class participation is not otherwise counted in students grades at all. (For instance, suppose that, except for these grade reductions as a result of absences, all students grades are computed simply by averaging test results, regardless of whether the students actively participated in class discussions.)

Policies under which students who miss, e.g., eight classes fail automatically while everyone else's grades are totally unaffected by attendance or participation are particularly hard to characterize as "class participation" measures. If the school attempts to justify the policy as simply a minimum participation requirement -- i.e., if you have not been to a certain number of classes, you have not really taken the course -- one might then ask why students with "excused" absences are not affected, despite their not having "taken the course." (If, on the other hand, the policy applies to all absences, so that students are penalized for illness, the policy can be attacked on other grounds. See especially §VII.E, "Conditions Beyond the Student's Control," as well as the state laws concerning attendance. [See Sprague v. Harrison Community Schools, infra.])

Underlying all this is a question about the relationship between academic performance and attendance. Presumably, missing class should be enough of an academic penalty in itself, since the student will then either have to do extra work to catch up or be at a disadvantage on any tests. Thus, an automatic grade reduction would appear to be a double penalty. If the student's test performance is unaffected by missing classes, a number of questions are raised. Either nothing is being taught, or for some students there are other equally valid ways to learn it which do not require being in class, or the exam itself is not valid since it does not measure what is taught.

One court seemed to have similar concerns in supporting a student's challenge to a policy under which students who miss four classes "may" be removed from the program. After noting the student's claim that the

3[illegible]

decision was disciplinary, the college's claim that it was academic and that the student had simply failed to meet a course requirement, and the court's view that the policy action was neither strictly academic nor disciplinary and that the policy implied some discretion, the court then declared,

> In this case, if the requirement is academic as defendant contends, the decision to drop plaintiff was made arbitrarily, without any attempt to evaluate the effect of plaintiff's absence. Defendent did not give plaintiff the chance to show that he had learned the material covered in his absence. This was a violation of plaintiff's due process rights. [Kelley v. Charles Stewart Mott Community College, C.A. No. 80-40397, Slip Op. at 2 (E.D.Mich. 2/9/81) (Clearinghouse No. 31,166.)]

See also §VIII.C.4, below, on the "academic"/"disciplinary" distinction.

Cases

A number of cases have overturned school policies which reduce grades or credit for non-attendance:

Kelley v. Charles Stewart Mott Community College, supra;

Opinion of the Attorney General, No. CV 74-145 (Cal. 8/13/75) (policy reducing number of credits for students who fail to attend 90% of the classes in a course held ultra vires; policy appears to be an attempt to curb truancy, but legislature has enacted a different scheme for dealing with truancy, which must be used instead):

Gutierrez v. School District R-1 Otero County, C.A. No. 12160 (Colo.Dist.Ct., Otero County, 5/31/78) (Clearinghouse No. 25,218A,B) aff'd, 585 P. 2d 935 (Col. App. Ct. 1978) (striking down a policy under which students lost all credit for any course in which they had seven absences in one semester, including absences due to illness or suspension; despite the existence of a statute giving districts the authority to issue rules concerning student conduct, discipline, and study, to issue rules concerning student conduct, discipline, and study, the rule was held ultra vires because the legislature had enacted a scheme for enforcing compulsory attendance and had not included such rules; the court of appeals focused on a somewhat different aspect -- the fact that another state statute which provided that days missed because of illness or suspension would be counted toward the required 172 days of school attendance);

Dorsey v. Bale, 521 S.W.2d 76 (Ky.App. 1975) (illegal to reduce grades for unexcused absences including suspension, since the state statute which authorized suspension was silent on academic punishment);

Sprague v. Harrison Community Schools, No. 80-005300-PZ (Mich. Cir.Ct., Clare Cty., 9/10/80) (Clearinghouse No. 29,225B) (policy under which students missing eight or more days in term lose credit held ultra vires because not provided for in state truancy statute; also illegal because of failure to distinguish excused and unexcused absences; also, policy discourages attendance contrary to the compulsory attendance law);

State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo.App. 1977) (student had missed last eight weeks of junior year following a suspension, with some doubt as to whether this absence was voluntary and not coerced by the principal; held unreasonable and discriminatory to then, at end of senior year, deny him a diploma and require that he re-enroll for another eight weeks under board policy requiring eight semesters of enrollment, even though he had obtained the required number of credits);

In re Blackman v. Brown, 419 N.Y.S.2d 796 (Sup.Ct., Ulster County, 1978) (where student missed class 48 days, school had no authority to remove her from class and give her a failing grade pursuant to school rule concerning class cutting; rule was *ultra vires* since legislature had adopted a different scheme for addressing truancy; the rule was not authorized by state suspension statute which permits suspension for students who are insubordinate or disorderly or who impose a threat to the health, safety, morals or welfare of themselves or others; "there appears to be no specific grant of authority . . . and such authority should not be implied from any grant of general supervisory powers when the net effect is that a pupil who violates the compulsory education law often enough is excused from further compliance;" commitment made by student and mother not to skip any more classes could not be relied upon as a contract, since "local authorities and these petitioners could not validly contract to subvert this State's public policy as such is expressed in the compulsory attendance statutes nor could petitioners effectively waive the performance by school authorities of their statutory duty to enforce that policy;" school ordered to reinstate student in the class and allow her to take final exam);

See: *Church of God v. Amarillo Independent School District*, 511 F.Supp. 613, 617 (N.D.Tex. 1981) (imposing zero for each day, beyond two, missed for religious reasons places unconstitutional burden on free exercise of religion);

Winters v. Board of Education of City of Buffalo, C.A.No. 78-75 (W.D.N.Y., 5/25/78) (stipulation for entry of judgment stated that suspension "shall not be a basis for any academic or disciplinary action");

Cases dealing with exclusion as punishment for attendance offenses, §VIII.C.2, below;

Cases dealing with grade reductions for loss of credit for other non-academic conduct, §VIII.C.3, below.

Cf.: §VIII.G, "Exclusion from Graduation Ceremonies."

But See:

Knight v. Board of Education, 348 N.E.2d 299 (Ill.App. 1966) (reduction of one letter in quarter's grade for two days of truancy upheld).

Where the missed classes are the result of an *illegal* expulsion or suspension, grade or credit reduction for those absences are of course illegal as well, over and above the other reasons why grade reductions for absences may be illegal. For cases, see §XIII.A.2.b on remedies for wrongful exclusion.

2. EXCLUSION AS PUNISHMENT FOR ATTENDANCE OFFENSES

Suspension or other forms of exclusion are often imposed by many school districts for cutting classes, tardiness, etc. This practice is subject to the same ultra vires, substantive due process, and equal protection challenges as grade reducations for attendance offenses, above. [See also §VIII.A, "Exclusion (Suspension, Expulsion, Etc.")]

In addition, it should be particularly easy to demonstrate the irrationality of responding to students' failure to come to class by barring them from class. See In re Blackman v. Brown, supra, 419 N.Y.S.2d at 798, where the court said that authority to remove a truant student from a class and deny her the right to take her final examination "should not be implied from any grant of general authority when the net effect is that a pupil who violates the compulsory education law often enough is excused from further compliance."

Decisions overturning exclusion and related penalties for attendance offenses include:

Opinion of the Attorney General, OAG No. 075-148 (Fla. 5/29/75) (school districts in Florida have no authority to suspend or expel students within compulsory school age for unexcused absence or truancy because legislature, by adopting certain responses to truancy, has ruled out all other responses);

King v. Farmer, 424 N.Y.S.2d 86 (Sup.Ct., Westchester County, 1979) (truancy held not a grounds for suspension where state statute authorized suspension for students who are insubordinate or disorderly or who threaten the health, safety, morals or welfare of themselves or others; further, legislature has addressed attendance issues through different means.).

See: Cases striking down academic penalties for attendance offenses, §VIII.C.1, above.

See also Chicago Board of Education v. Terrile, 47 Ill.App.3d 75, 5 Ill.Dec. 455, 361 N.E.2d 778 (1977), where the court held that commitment of a student to a parental school for habitual truancy violated due process:

> The purpose of the compulsory school attendance law . . . is to assure that all children receive a minimum education. . . . Hence the only legitimate interest of the State in a habitual truant's commitment to a parental school is to provide the truant with a minimal level of education; punishment is clearly not a legitimate interest. . . . However, the State may not pursue a governmental purpose, albeit legitimate and substantial, by means which abridge fundamental liberties more broadly than necessary. The purpose must be achieved by means of the least restrictive viable alternative. . . . [361 N.E. at 781]
>
> Commitment of a habitual truant to a parental school involves a substantial abridgement of personal liberties, including the freedoms of association, movement, and privacy. . . [782]

> . . . [T]o satisfy the constitutional doctrine of least restrictive alternative, the Board must make an affirmative showing that: (1) its existing less restrictive alternatives are not suitable to meet the particular needs of the habitual truant, and (2) confinement in a parental school is a suitable means to meet those needs. [782]

3. GRADE REDUCTIONS AND LOSS OF CREDIT FOR OTHER NON-ACADEMIC CONDUCT

Aside from policies which reduce grades or credit for cutting class or tardiness, there are a variety of less overt ways in which grades or credit may be improperly affected by factors other than academic performance. In some cases, the student may find himself/herself penalized academically for exercising rights of free expression in or out of the classroom, which is clearly subject to First Amendment challenge. (See §I generally, expecially §I.B.1, "Speech (and Within-Class Expression);" and §I.C, "Retaliation for Exercising First Amendment Rights.") In other cases, the student will have to rely on ultra vires, substantive due process, or equal protection by showing that the grade is arbitrary or capricious. (See §VIII.C.1, above, as well as §VI.A-C.) At times, there may be a fine line here, since classroom participation and evaluation of essay questions require "subjective judgment" and yet can be a proper part of academic evaluation.

Court decisions overturning academic punishment for non-academic conduct other than attendance offenses include:

Coats v. Cloverdale Unified School District Governing Board, No. 80029 (Cal.Super.Ct., Sonoma County, 1/20/75) (Clearinghouse No. 14,462) (mandamus issued where student was given a failing grade in physical education, thereby preventing his graduation, for refusal to run laps around the gymnasium as punishment for being on the losing side of a volley-ball game, based on court's finding that the action appeared to be ultra vires and/or in violation of substantive due process and/or equal protection);

DeMarco v. University of Health Sciences, 352 N.E.2d 356 (Ill.App. 1976) (court concluded that student was dismissed for failure to make financial contribution, and not for academic reasons; held arbitrary and unreasonable);

Valentine v. Independent School District, 191 Ia. 1100, 183 N.W. 434 (1921) (student who had met all requirements for graduation could not be denied diploma for refusal to wear cap and gown but could be barred from graduation ceremony);

Report of the Attorney General, No. 3545 (Mich. 8/29/60) (Michigan School Code "must be construed to withhold from the board of education of any school district the right to deny credits or not to graduate any student who, after satisfactorily completing his academic studies, violates other rules and regulations of the school district");

Detro v. Miami University, C.V. 72-05-0336 (Ohio Ct. of Common Pleas, Butler County, Dec. 27, 1972) (withholding grades and diploma for failure to pay motor vehicle fine struck down as unusual and unreasonable punishment);

Opinion of the Attorney General, O.A.G. No. 6137 (Oregon, June 1, 1966) (students may not be denied opportunity to take final examinations because of non-payment of fees).

See: Shuffer v. Trustees of California State University and Colleges, 136 Cal.Rptr. 527 (Cal.App. 1977) (not legally permissable for a university or faculty to pursue unreasonable or punitive course with student for reasons unrelated to his qualifications for degree).

Cf: Long v. Zopp, 476 F.2d 180 (4th Cir. 1973) ("Awards, properly earned in either [athletic programs or academic programs], cannot be used as instruments to enforce compliance with a 'hair code,' for the enforcement of which there is no compelling necessity");

Dawson v. Hillsborough County, Florida School Board, 322 F.Supp. 286 (M.D.Fla. 1971) (noting evidence indicating that students' violations of hair length regulations may be biasing teachers' academic grading).

See also:

Cases rejecting grade reduction and loss of credit for attendance offenses, §VIII.C.1, above.

4 PURELY ACADEMIC DECISIONS -- THE "ACADEMIC"/"DISCIPLINARY" DISTINCTION

In Board of Curators v. Horowitz, 98 S.Ct. 948 (1978), the Supreme Court drew a sharp distinction between academic dismissals and disciplinary dismissals. The Court did not decide whether students facing academic dismissals are entitled to due process, but held that, assuming due process is required, it is of a different nature than the due process required for disciplinary decisions. In regard to substantive due process, the Court noted that lower courts have stated or implied that academic dismissals can be overturned if shown to be in bad faith, malicious, arbitrary, or capricious, but courts will be reluctant to evaluate academic decisions, and in the particular case the Court held that there was no showing of arbitrary or capricious evaluation. 98 S.Ct. at 956.

The lengthy list of purely academic dismissal cases which have articulated this "arbitrary and capricious" standard is beyond the scope of this disciplinary manual. For a small sampling, compare, for example:

Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975);
Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975);
Valvo v. University of Southern California, 136 Cal.Rptr. 865 (Cal.App. 1977);
Tanner v. Board of Trustees, 363 N.E.2d 209 (Ill.App. 1977);
Abbariao v. Hamline University School of Law, 258 N.W.2d 108 (Minn. 1977);

State ex rel. Miller v. McLeod, 605 S.W.2d 160 (Mo.App. 1980);
with:
Stevens v. Hunt, 646 F.2d 1168 (6th Cir. 1981);
Morpurgo v. United States, 437 F.Supp. 1135, 1137 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1045 (2nd Cir. 1978), *appeal dismissed*, 439 U.S. 1000 (1978);
Jansen v. Emory University, 440 F.Supp. 1060, 1063-64 (N.D.Ga. 1977);
Hubbard v. John Tyler Community College, 455 F.Supp. 753, 756 (E.D.Va. 1978);
Johnson v. Sullivan, 571 P.2d 798 (Mont. 1977);
Sofair v. State University, 388 N.Y.S.2d 453, 455-57 (S.Ct., N.Y. App.Div., 1976).
Cf.: *Debra P. v. Turlington*, 474 F.Supp. 244, 266-67 (M.D.Fla. 1979), *aff'd in relevant part and remanded for consideration of further relief*, 644 F.2d 397 (5th Cir. 1981), (fundamentally unfair, in violation of due process, to deny diplimas to students for failing "functional literacy" test, where test requirement was not implemented until students had reached high school and test attempted to measure skills which should have been taught in early grades and which may have not been taught at all);
Kelley v. Charles Stewart Mott Community College, *supra*.

Courts' reluctance to review academic decisions should not apply, however, where what is claimed to be an academic decision is really a disciplinary decision in disguise. See:

Brookins v. Bonnell, 362 F.Supp. 379 (E.D.Pa. 1973);
Greenhill v. Bailey, supra, 519 F.Supp. at 8;
Jansen v. Emory University, *supra*, 440 F.Supp. at 1063;
Cases and discussion concerning lowering of grades or credits for missing classes, §VIII.C.1, above;
Cases concerning academic penalties for other forms of conduct, §VIII.C.3, above.

Cf.: *In re Pellinger*, Decision No. 10311 (N.Y.S.Ed.Comm'r 7/22/80) (inadequate due process provided to student who received zero for allegedly cheating).

For discussion of whether purely academic decisions involve liberty or property interests, and the extent to which procedural safeguards are required, see Procedural Rights, §X.H.

See also the material on "Showing That the Policy is Disciplinary," in §VIII.C.1, *supra*.

D. DISCIPLINARY TRANSFER

"The Board's code is inadequate in that it relies heavily on the transfer of a student from one school to another as a disciplinary procedure. The practice of transferring incorrigible students to other schools in the system is frowned upon by the court. Transferring incorrigible students from one school to another merely transfers a problem; it does not provide disciplinary solutions."

Bradley v. Milliken, C.A. No. 35257
(E.D.Mich., Opinion and Order,
July 7, 1975).

The degree to which transfer is a serious punishment is highlighted in Procedural Rights, §X.C. That section discusses transfer as a deprivation of liberty and property interests, thereby entitling the student to due process.

Challenges Similar to Those for Lengthy Exclusions

In addition to the procedural claims discussed in that section, students facing disciplinary transfer may be able to raise some of the same substantive claims (e.g. *ultra vires*, substantive due process, and equal protection) which are possible in challenging long-term disciplinary exclusions, while recognizing that there are some significant differences. See §VIII.A, "Lengthy Exclusions as Excessive or Unwarranted." In addition, other grounds for challenge may arise from the nature of the program to which the student is transferred.

Deprivation of Fundamental Rights

Some guidance as to substantive standards is also provided by Chicago Board of Education v. Terrile, 47 Ill.App.3d 75, 361 N.E.2d 778 (Ill.App. 1977), where the court held that the district, in commiting a student to a special school for truants, violated her due process rights by abridging liberties of association, privacy, and movement without demonstrating both that such commitment was the least restrictive means available and that it would meet the student's needs:

> .. [T]he State may not pursue a governmental purpose, albeit legitimate and substantial, by means which abridge fundamental liberties more broadly than necessary. The purpose must be achieved by means of the least restrictive viable alternative.
>
> ... Commitment of a habitual truant to a parental school [school for truants] involves a substantial abridgement of personal liberties, including the freedoms of association, movement, and privacy.

> ... The laudable governmental purpose of education must be achieved by the means which least infringe upon these liberties.
>
> ... [T]o satisfy the constitutional doctrine of least restrictive alternative, the Board must make an affirmative showing that: (1) its existing less restrictive alternatives are not suitable to meet the particular needs of the habitual truant, and (2) confinement in a parental school is a suitable means to meet those needs. [361 N.E.2d at 781-82.]

While most disciplinary transfers do not involve as severe a deprivation of liberties as the transfer to the parental school here, the discussion and cases concerning the losses involved in almost any disciplinary transfer (See Procedural Rights, §X.C) call for some attention to the court's opinion. The court's reasoning should in any event apply with full force whenever the transfer involves the deprivation of "fundamental" liberties or rights, since, under basic substantive due process and equal protection analyses, such deprivations are justified only when clearly necessary to serve a compelling state interest which cannot be served by any less drastic means. (See §VI.B and §VI.C, as well as §I.A, "Freedom of Expression: General Principles," and §IV.A, "Privacy.")

See also St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974), where the court held that suspension and transfer of students because their mother assaulted their teacher violated their substantive, fundamental due process right not to be punished in the absence of personal guilt. The court rejected the school district's argument that the transfers were not "punishment" because they were allegedly designed to restore order. (Id. at 427). The court also held that the transfers could not be justified as a means to restore teacher authority and stop other students from ridiculing the teacher, since other means to accomplish those ends were available. (Id. at 427-28). (For discussion of the substantive right, see §VII.E, "Conditions Beyond the Student's Control.")

Unconstitutional Compulsory Attendance Without Minimally Adequate Education

Similar arguments can be made if the school or program to which the student is transferred is basically just a holding pen in which no real education is provided. Students may have a claim that they are being deprived of liberty without due process of law if they are compelled to go to school and yet do not receive a minimally adequate education.

In an analagous situation, courts have ruled that civil confinement of mentally ill, mentally retarded, or juvenile delinquent persons to institutions without any meaningful treatment is a denial of due process. If meaningful treatment is not provided, then the confinement amounts to imprisonment, which is only legal upon finding a violation of a specific criminal law and only after more extensive criminal due process procedures than are afforded in civil commitments. See, e.g.:

Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974);
Donaldson v. O'Connor, 493 F.2d 507, 519-21 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975);
Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974);
Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354, 1364-65 (D.R.I. 1972);
Martarella v. Kelley, 349 F.Supp. 575 (S.D.N.Y. 1972);
Stachulak v. Coughlin, 364 F.Supp. 686 (N.D.Ill. 1973);
Welsch v. Likins, 373 F.Supp. 487, 491-99 (D.Minn. 1974);
Pena v. New York State Division for Youth, 419 F.Supp. 203, 206-07 (S.D.N.Y. 1976);
Morgan v. Sproat, 432 F.Supp. 1130, 1136 (S.D.Miss. 1977);
Gary W. v. Louisiana, 437 F.Supp. 1209, 1216-17 (E.D.La. 1976);
Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D.Pa. 1977), *aff'd on other grounds*, 612 F.2d 84 (3rd Cir. 1979), *rev'd on other grounds*, 101 S.Ct. 1531 (1981), *motion for stay denied*, 526 F.Supp. 409 (1981) (refusing to stay the original remedial orders, finding that plaintiffs were likely to prevail on the original constitutional and other claims which had not been addressed by the Court of Appeals or Supreme Court);
Davis v. Hubbard, 506 F.Supp. 915 (N.D.Ohio 1980).
Cf.: *Parham v. J. R.*, 99 S.Ct. 2493 (1979);
Youngberg v. Romeo, ___ S.Ct. ____, 50 U.S.L.W. 4681 (6/18/82);
Rouse v. Cameron, 373 F.2d 451, 453 (D.C.Cir. 1966);
McRedmond v. Wilson, 533 F.2d 757, 762-64 (2nd Cir. 1976);
Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977);
Ohlinger v. Watson, 652 F.2d 775 (9th Cir. 1980);
Rennie v. Klein, 653 F.2d 836 (3rd Cir. 1981).

In reviewing *Donaldson v. O'Connor*, *supra*, the Supreme Court, 422 U.S. 563 (1975), affirmed the basic ruling of the lower court and held that confinement of a non-dangerous person without providing any treatment violated due process. The Court specifically did not reach the question of either (a) whether a person who is dangerous to self or others can be civilly confined without treatment or (b) whether a non-dangerous person can ever be confined, even if treatment is provided.

In *Youngberg v. Romeo*, *supra*, the Supreme Court addressed a limited aspect of this right. Defendants conceded that institutionalized persons have a right to certain services and care. The plaintiff, who was profoundly retarded, conceded that no amount of training would make possible his release, and he appeared to be seeking only training related to his needs for physical safety and for minimization of physical restraints. The Court upheld this claim, first by holding that the plaintiff had a liberty interest in safe conditions and in freedom from unreasonable bodily restraint (he had been injured many times and often placed in physical restraints), and second by holding that he was entitled to minimally adequate training which would reasonably allow him to increase his safety and decrease his risk of being placed in restraints. A professional's decision as to adequacy will, according to the Court, normally be upheld unless it substantially departs from accepted professional judgment, practice or standards. The Court did not address the question of whether the plaintiff could have prevailed had he sought any broader form of training, a question affirmatively addressed by the lower court decisions cited above.

One court has stated that students charged with habitual truancy can, using a theory similar to that of the "right to treatment" cases, raise as a defense an argument that the education provided is so inadequate that compulsory education constitutes confinement without due process. In re Gregory B., 387 N.Y.S.2d 380 (N.Y.Fam.Ct. 1976). The theory as applied to education is also discussed, without deciding the issue, in Fialkowski v. Shapp, 405 F.Supp. 946, 959n.10 (E.D.Pa. 1975). In Lora v. Board of Education, 456 F.Supp. 1211, 1274-75 (E.D.N.Y. 1978), vacated and remanded on other grounds, 623 F.2d 248 (2nd Cir. 1980), the court applied these right-to-treatment principles to hold that emotionally disturbed children could not be segregated in special day schools without affording them appropriate educational and therapeutic treatment" (1274). While conceding that the deprivation of liberty was not as vast as in residential institutionalization, the court nevertheless found the schools to be a "restrictive" environment, noting segregation from peers and travel distances (1275). The court concluded, "Without adequate treatment, therefore, the rationale for confining children in the special day school collapses" (1275).

This is also one way of reading Chicago Board of Education v. Terrile, supra, where the court held that, since the purpose of the compulsory attendance law is to assure that all children receive a minimum education, due process requires that a child not be confined to a parental school for habitual truants unless it is shown that existing less restrictive alternatives are not suitable to meet her particular needs and that the parental school is suitable to meet those needs.

To the extent that the institutional "right to treatment" cases are applicable to public schools, the definitions of that right to treatment found in those cases can be helpful in challenging the program at the receiving school. For instance, in Gary W., supra, 437 F.Supp. at 1219, the court stated, in regard to mentally retarded, physically handicapped, and delinquent children,

> The constitutional right to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency.

Further, these decisions often emphasize four basic components of the treatment which are relevant to public schools: (1) individualized programs, Nelson, 491 F.2d at 360; Morgan, 432 F.Supp. at 1140-43; Gary W., 437 F.Supp. at 1225-26; (2) provision of that program in the "least restrictive" environment possible, Welsch, 373 F.Supp. at 501-02; Gary W., 437 F.Supp. at 1216-17; Rennie, 653 F.2d at 845; Halderman, 446 F.Supp. 1295, 526 F.Supp. at 409; Chicago Board of Education, supra; (3) an environment which is in fact conducive to treatment, with concern for a wide variety of programs, recreation, respect for the individual's basic rights and dignity, etc., Morgan, 432 F.Supp. at 1141, 1146-55; Gary W., 437 F.Supp. at 1226-30; Davis, 506 F.Supp. at 923, 942; and (4) sufficient numbers of qualified staff to provide the individualized programs, Inmates of Boys' Training School, 346 F.Supp. at 1374; Martarella, 349 F.Supp. at 601; Morgan, 432 F.Supp. at 1141, 1143-46; Davis, 506 F.Supp. at 921.

More generally, and also implicit in the focus on least restrictive alternatives, is the direct recognition of the confined individual's constitutionally protected interests in freedom from physical harm and from unwarranted physical constraints. See, e.g., Youngberg, supra; Davis, 506 F.Supp. at 942; Halderman, 446 F.Supp. 1295, 526 F.Supp. at 409.

For related discussion, see §VIII.K, "Behavior-Modifying Drugs."

Consent

In addition to the notice and hearing procedures discussed under Procedural Rights, it may be possible to argue that consent should be required by student and parent before being transferred to any kind of special school or program for disciplinary reasons, so that students and parents can reject the transfer and choose disciplinary exclusion instead -- assuming the legal requirements for such an exclusion have been met. This concept, designed as a safeguard against placement in objectionable programs which differ significantly from the district's regular program, is discussed further under §VIII.E., "In-School Suspensions."

Racial Discrimination and Segregation

Where minority students are overrepresented in special disciplinary schools or programs, there may be a violation of equal protection or Title VI of the 1964 Civil Rights Act. In addition to the legal analysis which applies to racial discrimination in suspensions (see §III.A and §VIII.A), it may be possible to challenge the practice as establishing segregated schools or programs (particularly if the district is under a desegregation order).

Violation of Rights of Students Classified as Handicapped or Referred for Evaluation

Transfer of students who have been classified as handicapped or who have been referred for evaluations can be challenged under the federal laws protecting handicapped students. The argument here is the same as for suspension or expulsion -- primarily that such students cannot be excluded from their existing program, except for very short suspensions in real emergency situations, without going through the special education change-in-placement procedures. In fact, the argument should be easier to see when the student is placed in a different setting.
setting. (See §III.C for explanation and conflicting case law on what See *M.R. v. Milwaukee Public Schools*, 495 F.Supp. 864, 869-70 (E.D.Wis. 1980) (proposed unilateral termination of plaintiffs' current placement at day treatment educational centers enjoined; requirements of federal and state statutes for maintaining student's current educational placement pending any proceedings concerning "change in educational placement" cannot be circumvented on the ground that day treatment educational centers are not educational placements); *New York State Association for Retarded Children, Inc. v. Carey*, 612 F.2d 644 (2nd Cir. 1979), affirming 466 F.Supp. 479, 486 (E.D.N.Y. 1978)(indefinite exclusion of retarded children who are carriers of hepatitis B violates §504 of the Rehabilitation Act and the Education for All Handicapped Children Act); *Leo P. v. Board of Education, School District No. 230*, No. 81 C 6179, N.D. Ill., April 13, 1982; 3 EHLR 553:644, 64[illegible] (Plaintiffs' motion for summary judgment granted and LEA ordered to reimburse parents for placement during pendancy of administrative review proceedings and any future judicial proceedings; LEA not permitted to make a unilateral change in handicapped child's placement; "Congress clearly contemplated [in enacting §1415] that placement could not be changed, under any circumstances, without the consent of the parents or until the appeal procedure was completed.") But see *Concerned Parents and Citizens for the Continuing Education at Malcolm X (PS 79) v. Board of Education*, 629 F.2d 751, 753-54 (2nd Cir. 1980), *cert. denied* ____ U.S. ____ (1981) (the term "educational placement" in §1415(b)(1)(C) refers only to the general type of educational program in which a handicapped child is placed; transfer of handicapped children in special education classes at one school to special education classes in other schools within the same school district does not constitute a change in educational placement.); *Brown v. District of Columbia Board of Education*, C.A. No. 78-1646, D.D.C. 1978; 3 EHLR 551:101, 103 (transferring the Deaf-Blind Class from the Tyler School to the Sharpe Health School is not a change in educational placement triggering due process requirements whose use is contemplated only for changes that affect the form of educational instruction being provided to a handicapped child).

Thus the transfer can be challenged as a violation of one or more of the requirements spelled out in the regulations for the Education for All Handicapped Children Act (34 C.F.R. Part 300) and for §504 of the Rehabilitation Act (34 C.F.R. Part 104), including:

- evaluation and placement procedures (§300.550-56; §104.35);
- individualized education plan requirements (§300.340-49);
- the right to an appropriate education designed to meet the student's unique needs (§300.4, .14, .121, .300-07, .346; §104.33);
- least restrictive environment requirements (§300.500-12; §104.34);
- requirements for notice, parent consent, due process hearings, and appeals (§300.500-12; §104.36);
- protection of the student's status during the above proceedings (§300.513);
- protection against discrimination on the basis of handicap (Part 104 generally, particularly §104.4).

Further, if the program at the new school is more limited or restrictive, two other requirements may be violated. First, handicapped students must be provided with non-academic services and activities in such a manner as is necessary to afford them opportunity for equal participation. [§104.37(a)(1).] Second, where school systems operate facilities identifiable as being for handicapped students, those facilities and the services and activities provided therein must be comparable to the other facilities, services, and activities of the school system. [§104.34(c).]

Special Education Programs in Disguise -- Violation of Handicapped Laws for Students Never Classified or Referred for Evaluation

These same laws may be violated by transfers even for students who have never been classified as handicapped or referred for evaluations. The argument here is that certain schools or programs are really functioning as special education programs while the school is ignoring all the substantive and procedural requirements which must be met under those laws before placing students in any such program. This applies both if the students actually are "handicapped" (including "seriously emotionally disturbed" as defined under the statutes) or if the school treats them as having handicaps, real or imagined, since the latter are protected under §504 of the Rehabilitation Act (34 C.F.R. §104.3). This is separate from the argument in §III.C and §VIII.A that behavior serious enough to justify very lengthy exclusion may constitute a "handicap" in either of these senses, thereby mandating programming and prohibiting exclusion on the basis of this "handicap" -- an argument which may also apply to disciplinary transfers.

E. IN-SCHOOL SUSPENSION

School systems attempting, for a variety of reasons, to find "alternatives" to suspension more and more frequently turn to "in-school suspension" -- often with special federal funding. Some of these programs may have certain positive qualities, but the range of problems has been well documented -- mere holding pens with no education provided; methods objectionable to at least some students and parents, such as severe physical isolation or sensory deprivation, behavior modification techniques, unwanted psychotherapy, etc.; stigmatization; racially identifiable programs; and a tendency to divert attention to the student as offender and away from attempts to change overall school practices. (See materials on in-school suspension in §XIII.B, "Alternatives.")

In-School Suspension as a Form of Suspension -- Right to Due Process

The argument that in-school suspension should be regarded as a form of suspension rather than an "alternative" to suspension, and that in-school suspensions involve deprivations of liberty or property which entitle the student to due process, is made under Procedural Rights, §X.D. Discussed below are substantive grounds for challenging in-school suspensions.

General Substantive Challenges

When viewed as a form of suspension from the student's regular program, in-school suspension may be subject to at least some of the same ultra vires, substantive due process, and equal protection attacks which can be directed at other suspensions. (See §VIII.A.) There are additional grounds for challenging some in-school suspensions, however, which do not apply to other suspensions. These challenges are directly analogous to the special challenges applicable to some forms of disciplinary transfer (see §VIII.D above). The ease with which they can be made will depend in part upon the length of time the student spends in such programs, as well as the nature of the programs.

Deprivation of Fundamental Rights

First, various aspects of in-school suspension programs may deprive students of rights of free expression and association (§1), privacy (§IV), or other fundamental rights. This may be an issue particularly for programs which involve behavior modification, psychotherapy, physical isolation, etc. Deprivation of fundamental rights is permissable only when the school demonstrates that it is clearly necessary to serve a compelling state interest which cannot be served by any less restrictive means. (See §I and §IV, as well as §IV.B., "Substantive Due Process", and §IV.C, "Equal Protection.") The quotation from Chicago Board of Education v. Terrile, 47 Ill.App. 3d 75, 361 N.E.2d 778 (Ill.App. 1977), discussed in §VIII.D, "Disciplinary Transfer," is relevant here.

Unconstitutional Compulsory Attendance Without Minimally Adequate Education

If the in-school program is no more than a holding pen, with no real education provided, and the student is compelled to attend, the argument that the student is being deprived of liberty without due process of law (the right to treatment theory), takes precisely the same form as in §VIII.D, "Disciplinary Transfer."

Consent as a Safeguard

Because of the potential constitutional violations above, it may be possible to argue that no student may be placed in such in-school suspension programs without voluntary, informed consent of student and parent, giving the student and parent the option to choose regular suspension instead (assuming that such regular suspension is warranted). This point is made by Merle McClung, "Alternatives to Disciplinary Exclusion from School," 20 Inequality in Education 58, 68-69 (1975), who also points out other reasons for a consent requirement:

> This article has noted that some alternative programs may entail unacceptable behavior control, and that individual liberties may be infringed by programs designed to bring behavior into conformity with a preconceived norm. Where these programs take the form of separate classes, their very existence may make schools and teachers more willing to give up on a student within the regular class framework. . . .
>
> Consent of the parent, and of the student after a certain age, is perhaps as important as the due process hearing itself. While a consent provision raises the usual difficulties such as whether the consent is informed and at what age the student's preference should prevail, on balance consent which can be withdrawn at any time is necessary to insure against unacceptable forms of behavior modification, schools which are perceived as prisons, etc. The due process hearing should relieve the parent/student of any compulsory education requirement where they find the alternative unacceptable.
>
> Voluntary attendance may be especially important if a program for students with behavior disorders is to succeed. . . . At least until there is some experience showing that the educational alternatives are desirable and would continue to be so even on an involuntary basis, the parent/student should be given the ultimate responsibility for deciding whether or not to take advantage of the alternative.

In discussing the need for separate student consent, McClung notes, at 73 n. 57:

> There is a growing recognition that children should not be treated as simply parental appendages. See e.g., Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) where the court held, inter alia, that lack of parental consent regarding lengthy male hair was irrelevant, with the dissenting opinion expressing the traditional view. See generally the special issues on "The Rights of Children" in the Harv. Educ. Review, November 1973 and February 1974.
>
> For one discussion of the difficult question of when students should exercise some control over educational decisions which affect their lives, see E. Ladd, "Civil Liberties for Students -- At What Age?" 3 J. of Law and Educ. 251 (1974).

Racial Discrimination and Segregation

Where minority students are overrepresented in in-school suspension programs, there may be challenges analogous to those discussed in §VIII.D, "Disciplinary Transfer."

Violations of Rights of Students Classified as Handicapped or Referred for Evaluations

See §VIII. D, "Disciplinary Transfer."

Special Education Programs in Disguise -- Violation of Handicapped Laws for Students Never Classified or Referred

See §VIII. D, "Disciplinary Transfer."

F. EXCLUSION FROM EXTRACURRICULAR ACTIVITIES

In §X.F. of the Procedural Rights portion of this manual, arguments are made that:

- -- extracurricular activities are an integral part of the educational process (and, were they not, the school would probably be acting *ultra vires* in sponsoring them);
- -- school systems have created property interests in extracurricular participation;
- -- liberty interests are often affected by denial of extracurricular participation;
- -- therefore, exclusion from extracurricular activities must be accompanied by some form of due process.

As that section notes, not all courts have been supportive of these points.

Where exclusion from extracurricular activities deprives a student of property or liberty interests, s/he is entitled to substantive as well as procedural due process. (See §VI.B generally). Thus the penalty should not be so excessive or unrelated to the offense as to be arbitrary, capricious, or irrational. See:

In re Walczyk, 8 Ed.Dept.Rep. 154 (N.Y.Ed.Comm'r 1969);
In re Giarraputo, 8 Ed.Dept.Rep. 252 (N.Y.Ed.Comm'r 1969);
In re Myers, 9 Ed.Dept.Rep. 9 (N.Y.Ed.Comm'r 1969);
Bunger v. Iowa High School Athletic Association, 197 S.W.2d 555 (Ia. 1972) (unreasonable to remove student's athletic eligibility merely because he rode in a car in which he knew there was unopened beer),
Pelley v. Fraser, C.A. No. B-76-C-14 (E.D.Ark. 5/18/76) (Clearinghouse No. 19,518A)(granting preliminary injunction against removal from student council of student who, when directed in English class to describe a character "perhaps a teacher just as Chaucer would have written it," wrote a poem clearly directed at the principal and "notable only for its crude language and bad taste;" the court stated that "there is a serious due process question presented when a school official attempts to punish a student for complying with an assignment that seems to anticipate exactly the kind of work product that this assignment in fact produced").

See: *Kelley v. Metropolitan County Board of Education*, 293 F.Supp. 485, 493-94 ("imposition of penalties [interscholastic athletics] in the absence of prescribed standards of conduct is contrary to our basic sense of justice;" "the possibilities of arbitrary action are increased;" denial of due process).

Compare:
Pegram v. Nelson, 469 F.Supp. 1134, 1141 (M.D.N.C. 1979)(exclusion

from after-school activities for remainder of year not arbitrary and capricious where student was found to have stolen a wallet at a basketball game);

Braesch v. DePasquale, 265 N.W.2d 842, 846 (D.Neb. 1978) (expulsion from basketball team for remainder of season for drinking not held arbitrary or unreasonable).

As pointed out in §I.B.6, "Association -- Student Organizations," students do have a constitutional right of free association which arguably does protect participation in many extracurricular activities. This is easiest to see when the activity involved is a political organization, a student newspaper, the student government, etc., but, as that section notes, the right is not limited to such activities.

Even without a holding that the student has a property or liberty interest in extracurricular participation, the student may not be excluded from such activities for reasons that are prohibited by other constitutional or statutory provisions, such as the First Amendment or prohibitions against discrimination on the basis of race or sex. For example, in Brennan v. Redmond, C.A. No. 74-C-1163 (N.D.Ill. 2/11/77) (Clearinghouse No. 21,637), where a student alleged that she was not permitted to run for senior class president because of her work on an alternative newspaper, the court denied defendants' summary judgment motion, declaring:

> [D]efendants . . . take the position that . . . plaintiff did not have a "constitutional right" to run for class office. . . Plaintiff does have a constitutional right not to suffer reprisals at the hands of public school officials because of her exercise of First Amendment rights.

For other cases which spell out improper bases for denying extracurricular activities, see:

Matter of Vartuli, 10 Ed.Dept.Rep. 241 (N.Y.Ed.Comm'r 1971) (student may not be prohibited from participation in extracurricular activities because of dress or appearance, unless it constitutes a danger to health or safety, or prevents full participation by physically impairing ability to perform);

§VII.A, "Dress and Grooming" (favorable cases in only some jurisdictions);

§VII.B, "Outside Activities;"

§VII.C, "Marriage, Parenthood, Pregnancy;"

§III.A, "Race and National Origin Discrimination;"

§III.B, "Sex Discrimination;"

III.C.1, "Exclusion of Handicapped Students from Extracurricular Activities;"

§I, generally on free expression, especially §I.B.6, "Association" (which also addresses various kinds of non-disciplinary membership and eligibility rules), and §I.C, "Retaliation for Exercising First Amendment Rights."

Finally, it may be possible to challenge certain extracurricular exclusions on ultra vires grounds as not authorized by the legislature, regardless of the presence or absence of constitutional rights. See §VI.A generally.

G. EXCLUSION FROM GRADUATION CEREMONIES

§VIII.C lists cases in which students were improperly punished for misconduct by imposing academic penalties -- including grade reductions, loss of credit, and/or denial of diploma. In this section, the issue is exclusion from the graduation ceremony, rather than denial of diplomas, although cases concerning the latter may be somewhat relevant.

Where a student has met all the requirements for graduation, it may be argued that s/he cannot be excluded from the graduation ceremony for conduct which does not threaten order, physical safety, or compliance with valid rules at the ceremony itself. See:

Ladson v. Board of Education, 323 N.Y.S.2d 545 (N.Y.Super.Ct. 1971) (student who had met graduation requirements could not be barred from ceremony for allegedly striking or threatening to strike principal during a prior disturbance; court indicated that student could be barred only if school demonstrated that she was a threat to the orderliness of the ceremony itself);

In re Wilson, 11 Ed.Dept.Rep. 208 (N.Y.Ed.Comm'r 1972) (overturning exclusion from graduation ceremony for "consistent lack of good citizenship" based on cumulation of disciplinary incidents; "[w]hile there can be circumstances in which the denial of participation in a graduation ceremony would be warranted, it is generally an educationally unsound practice to deny a student the opportunity to appear at graduation where he has successfully completed the academic requirements therefore," further, it was improper to label a student a "poor citizen");

In re Murphy, 11 Ed.Dept.Rep. 180 (N.Y.Ed.Comm'r 1972) (participation in graduation ceremonies may not be denied because of pregnancy);

Castillo v. South Conejos School District, RE-10, C.A. No. 79-CV-16 (Colo.Dist.Ct., Conejos County, 4/18/79) (violation of equal protection to exclude student from graduation ceremony because she was an early graduate rather than a "regular" senior);

Clark v. Board of Education, 51 Ohio Misc. 71, 367 N.E.2d 69 (Ohio Common Pleas 1977) (similar holding on state law and equal protection grounds);

Cf: Detro v. Miami University, CV 72-05-0336 (Ohio Common Pleas, Butler County, 12/27/72) (withholding transcript of grades and diploma for failure to pay motor vehicle fine struck down as unusual and unreasonable punishment);

State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo.App. 1977) (discussed in §VIII.C.1; illegal denial of diploma for violating attendance requirements);

Coats v. Cloverdale Unified School District Governing Board, No. 80029 (Cal.Super.Ct., Sonoma County, 1/20/75) (Clearinghouse No. 14,462) (discussed in § VIII.C.3: illegal denial of diploma for other conduct);

Report of the Attorney General, No. 3545 (Mich. 8/29/60) (same).

Compare:

Fowler v. Williamson, 448 F.Supp. 497 (W.D.N.C. 1978) (no due process violation where student was excluded from graduation ceremony for wearing "brushed denim pants" and "dress boots");

Valentine v. Independent School District, 191 Ia. 1100. 183 N.W. 434 (1921) (student who had met all requirements for graduation could not be denied a diploma for refusal to wear cap and gown but could be barred from the graduation ceremony).

For other possible grounds upon which exclusion from graduation ceremonies may be challenged, see:

§VIII.F, "Exclusion from Extracurricular Activities;"

§§I through VII generally;

Procedural Rights, §X.G, which addresses whether there is a protected liberty or property interest in participation in graduation ceremonies, thereby entitling the student to due process.

H. WORK AS PUNISHMENT

In 1885, a court struck down, as *ultra vires*, a school rule which required each student of sufficient age and strength to carry a stick of firewood back to class from recess. The court found that the rule had "nothing to do with the education of the child. It is nothing but manual labor, pure and simple, and has no relation to mental development." *State ex rel. Bowe v. Board of Education of Fond du Lac*, 63 Wis. 234, 237, 23 N.W. 102, 103. The court stated that school regulations, in order to be valid, must relate to the advancement of pupils in their studies and their mental development.

A court today would be less likely to reach the same result, for it would be more prone to view physical development and social responsibility as acceptable educational goals which might be fulfilled by the rule. Nevertheless, it is incumbent upon schools to insure that their regulations actually do relate to valid educational goals. It might be argued that required work is one of the more valid educational forms of punishment. Where, however, such punishment is subject to abuse through repetitive, exhausting, or degrading tasks, it may be challenged under one or more of the grounds discussed in §VIII.B, "Corporal Punishment." It may also be possible to argue for a requirement that the task be aimed at remedying the damage caused by the misconduct. This also helps to insure that the student sees the connection between the punishment and the offense and does not feel that he/she is the victim of arbitrary authority.

It should also be remembered, before coercing a student to perform work duties not related to his/her courses, that students are compelled by law to be in school. Note, however, that prisoners who have challenged compulsory, uncompensated labor in prison as a form of involuntary servitude barred by the Thirteenth Amendment have generally lost. See *Holt v. Sarver*, 309 F.Supp. 362, 365 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Similarly, a court dismissed the Thirteenth Amendment claims of students who challenged a rule requiring all students in grades 4-12 to assist periodically in school cafeterias without compensation (maximum of seven days per school year). *Bobilon v. Board of Education, State of Hawaii*, 403 F.Supp. 1095 (D.Haw. 1975).

J. EXCLUSION FROM MEALS

It is a violation of the National School Lunch Act, 42 U.S.C. §1751 et seq., for schools to discipline students by restricting their access to school lunch or breakfast where those students are eligible under the Act for free or reduced price meals. The Act requires that participating schools serve every eligible student who is physically present in the school and wishes to participate. 42 U.S.C. §1758(b)(1). This has been affirmed in:

FNS Instruction 791-1 (United States Department of Agriculture, Food and Nutrition Service, 1978);

Westside Mothers Welfare Rights Organization v. Jefferson, C.A. No. 770961 (E.D. Mich., Consent Order, 7/1/77) (schools imposed "dry lunch" as discipline, denying them access to hot lunches, requiring them to bring lunch from home, and denying them access to liquids of any kind during school day; punishment was imposed on entire class for misconduct of one or more students; plaintiffs alleged violations of due process and of the National School Lunch Act and its regulations; consent decree recognized right of all eligible children to free or reduced price meals and permanently enjoined the schools from using these disciplinary measures and from denying eligible students access to free and reduced price meals, except for financial eligibility, and then only after compliance with hearing procedures contained in the Act's regulations).

The act also prohibits the school from taking any action which discriminates against students receiving free or reduced price meals, and schools must take steps to ensure that other students cannot tell which students get free or reduced price meals. For more information on these and related issues, contact the Food Research and Action Center, 1319 F Street, N.W., Washington, D.C. 20004, (202) 393-5060.

Even where the student is not eligible for free or reduced price meals, disciplinary measures which restrict access to food may be challenged under one or more of the theories in §VIII.B, "Corporal Punishment and Similar Abuses."

K. BEHAVIOR-MODIFYING DRUGS

Some schools effectively condition a student's continued attendance in a regular or special class upon parental consent to the use of behavior-modifying drugs on the student.[3] At one time tranquilizers were often prescribed to calm hyperkinetic children, but now stimulant drugs are in vogue because some studies have found that amphetamines and other stimulant drugs paradoxically increase attention span.[4] Although there are very few follow-up studies of the side effects of these drugs, some uses of stimulant drugs on some children under a physician's supervision appear justified.[5] But very few "troublesome" children are truly hyperkinetic, and stimulant drugs are being used on children who are mislabeled as hyperkinetic,[6] or are tagged with catch-all labels like "minimal brain dysfunction" (or "functional behavior disorder") which include a wide variety of "symptoms", many of which are common to almost all grade school children.[7]

Prescribing amphetamines or other drugs in an attempt to modify behavior represents a considerable medical intervention, and may not be the least restrictive intervention even for those children who are truly hyperkinetic. In June of 1973, a California medical researcher, Dr. Ben Feingold, reported to the American Medical Association his initial findings that artificial colors and flavors in foods and beverages may contribute to hyperactivity. Dr. Feingold claims to have successfully treated more than fifty children with hyperkinesis by prescribing a special diet free of the artificial additives found in convenience foods and soft drink powders.[8] Not only is prescription of a special diet a less restrictive intervention than behavior modifying drugs, but it also has the obvious advantage of addressing the cause rather than symptoms of the problem for those children whose hyperactivity is due to artificial additives in food. The National Institute of Education has funded further independent research of Dr. Feingold's findings.

The potential for misuse of drugs to control school children who exhibit non-conforming behavior has led to some proposals to prohibit their use.[9] A somewhat different approach has been adopted in Massachusetts where legislation[10] prohibits the administration of any psychotropic drug listed by the department of public health unless the school has obtained certification from the commissioner of public health or designee that the administration of such drugs in school is a legitimate medical need of the student, and then limits administration of approved medication to a registered nurse or a licensed physician. The act also prohibits administration of psychotropic drugs to students for the purposes of clinical research.[11]

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[3] "This procedure is needed, the psychologist says, if the child is to stay in the regular program. In some urban areas, however, the parent is told bluntly that unless the child receives treatment (i.e., medication), he will face suspension or be transferred to a special program for the emotionally disturbed. . . . The school often refers the child to a doctor who specializes in learning disabilities and routinely uses drugs in his treatment." D. Divoky, "Toward a Nation of Sedated Children," *Learning* (March 1973) at 8, 10. See generally the special report on behavior-modifying drugs in 8 *Inequality in Education* at 1-24.

In this troubling area where the medical evidence and educational issues are so complex, and where parents are subject to unusual pressure to submit to medication, it is especially important that procedural safeguards are developed to insure that parental consent to medication for the child is informed and without duress. Also, it should be obvious from *infra* notes 5-7 that only qualified doctors (preferably not school employees or referees) should label children as in need of behavior-modifying drugs.

[4] See, *e.g.*, C.K. Connors, *et al.*, Dextroamphetamine Sulfate in Children with Learning Disorders," 21 *Archives of General Psychiatry* 182-190 (1969); C.K. Connors, "Psychological Effects of Stimulant Drugs in Children with Minimal Brain Dysfunction," 49 *Pediatrics* 702-708 (1972); L. Eisenberg, "The Clinical Use of Stimulant Drugs in Children," 49 *Pediatrics* 709-15 (1972). A bibliography of such articles can be obtained from the Center for Law and Education.

[5] Compare the following:

> "The fact that these dysfunctions [hyperkinetic behavioral disturbance] range from mild to severe and have ill-understood causes and outcomes should *not* obscure the necessity for skilled and special interventions. The majority of the better known diseases—from cancer and diabetes to hypertension—similarly have unknown or multiple causes and consequence. . . . Yet useful treatment programs have been developed to alleviate these conditions." Report on "Conference on Stimulant Drugs for Disturbed School Children," 8 *Inequality in Education*

14, 15.

"The Medical Letter on Drugs and Therapeutics," a conservative, non-profit publication aimed at clinicians, describes the data on the use of amphetamine-type drugs on children as "meager" and goes on to charge that "there are no adequately controlled long-term studies of the use of stimulants on noninstitutionalized hyperactive children with IQs in the normal range who have only mild neurological abnormalities. Yet it is in such children that the diagnosis of 'minimal brain dysfunction' is most often made and for whom amphetmines may be prescribed. . . ." Divoky, *supra* note 3, at 10.

[6] "So common and so misleading are these symptoms that some doctors estimate that less than half of the children labeled hyperactive by teachers and sent for special treatment are in fact hyperactive." Divoky, *supra* note 3, at 8.

The "Conference on Stimulant Drugs," *supra* note 5 at 15, states that there is no single diagnostic test and the diagnosis should be made by a specialist. "In diagnosing hyperkinetic behavioral disturbance, it is important to note that similar behavioral symptoms may be due to other illnesses or to relatively simple causes. Essentially healthy children may have difficulty maintaining attention and motor control because of a period of stress in school or at home. It is important to recognize the child whose inattention and restlessness may be caused by hunger, poor teaching, overcrowded classrooms, or lack of understanding by teachers or parents. Frustrated adults reacting to a child who does not meet their standards can exaggerate the significance of occasional inattention or restlessness. Above all, the normal ebullience of childhood should not be confused with the very special problems of the child with hyperkinetic behavioral disorders."

[7] "The most commonly used of the 38 terms applied to a grab-bag set of symptoms found in grade school children is minimal brain dysfunction (MBD) . . . Hyperkinesis, the other most popular and misused label, is often used synonymously with MBD, or is described as the result of MBD." "And a new one, particularly favored by drug makers because it will cover anything: functional behavior disorder." Divoky, *supra* note 3, at 7.

"The condition commonly called minimal brain dysfunction—MBD—is not easy to diagnose: Specialists spend from six hours to three days on the diagnosis." 8 *Inequality in Education* at 8.

[8] *CNI Weekly Report* (Nov. 1, 1973) (published by Community Nutrition Institute, 1910 K. St., N.W., Washington D. C. 20006); Ben F. Feingold, *Why Your Child is Hyperactive* (1975).

[9] See, *e.g.,* The National Welfare Rights Organization's Petition of April 2, 1971 to the Food and Drug Administration "To Withdraw Approval of Methylphenidate Hydrochloride [Ritalin] For Use in Hyperkinetic Behavior Disorders in Children." Petition denied in decision of March 17, 1972.

[10] M.G.L. Chapter 71, s.54B.

[11] See generally the regulations developed by H.E.W. for the "Protection of Human Subjects" which limit the nature and methods of research funded by the Department. 39 *Federal Register* 18914 (May 30, 1974). See also the proposed supplementary regulations for children, prisoners, and the mentally infirm. 38 *Federal Register* 31738 (November 16, 1973).

The use of behavior modifying drugs raises constitutional questions since "autonomy over one's own body, without intrusion of drugs which modify behavior—*no matter how beneficial*—is a matter of ultimate personal concern." For possible substantive challenges and procedural safeguards, see Roderick Ireland and Paul Dimond, "Drugs and Hyperactivity: Process is Due," 8 *Inequality in Education* 19.

- Merle McClung, "Alternatives to Disciplinary Exclusion from School," 20 Inequality in Education 58, 302 (1975).

There are a variety of other problems associated with the use of such drugs, in addition to those cited by McClung above. Some were noted by Representative Cornelius Gallagher in opening Congressional hearings on the widespread use of stimulants in school:

> . . . This use of amphetamines to calm children termed hyperactive is called the "paradoxical effect" and it is but one of the many paradoxes which this hearing is designed to explore. Let me list a few contradictory implications.
>
> First, and a distressingly obvious paradox, is the effect of accelerating this use of amphetamines on our extensive national campaign against

> drug abuse. From the [illegible] of puberty onward, each and every child is told that "speed kills". . . . Yet this same child has learned that Ritalin, for example, is the only thing which makes him a functioning member of the school environment. . . .
>
> . . . .
>
> Second, I am very concerned about the fact that the child who has been undergoing drug therapy becomes a permanent part of the child's school record [sic]. . . .
>
> . . . .
>
> And here we come to what is perhaps the greatest paradox in this entire program. . . . I am well aware of the occasional frustrations which come from the fact that children simply do not sit quietly and perform assigned tasks. . . . For childhood is an exploratory time and the great energy of children propels them into situations which may look frivolous to more restrained adults, but which are the sum and substance of the child's learning experience. . . .
>
> Obviously, this unstructured passion for all the events in a child's world is regarded as unruly and disruptive, particularly in overcrowded classrooms. I fear that there is a very great temptation to diagnose the bored but bright child as hyperactive, prescribe drugs, and thus deny him full learning during his most creative years. [Hearings on Federal Involvement in the Use of Behavior Modification Drugs on Grammar School Children, before the Subcommittee on the Right to Privacy of the House Committee on Government Operations, 91st Cong., 2nd Sess. 1 (1979); quoted in Jane E. Jackson, "The Coerced Use of Ritalin for Behavior Control in Public Schools: Legal Challenges, 10 Clearinghouse Review 181 (July 1976).]

Further, the confusion both in definition and in diagnosis creates a vacuum in which:

> [T]he stimulant drug itself is used as a conclusive diagnostic tool. If the child does not respond favorably to stimulants, he or she is no longer considered hyperkinetic; if behavior improves, the treatment continues. About one-third to one-half of the children tentatively diagnosed as hyperkinetic may be forced to take the drug only to discover they do not benefit from it. [Jane S. Samuels, "Behavior Modification Through Drugs: A Legal Approach to an Ethical Problem," in Center for Law and Education, Constitutional Rights of Students, at 344 (1976) (Pat Lines, ed.).]

The fact that for some students the drug "works," however, is not necessarily proof of "hyperkinesis" either. (Id.) There is evidence of a "placebo" effect, in that some students improve even when taking a sugar pill. W. Wells, "Drug Control of School Children: The Child's Right to Choose," 46 *S.Cal.L.Rev.* 585, 591 (1973). There is also evidence of a "placebo" effect on teachers, who, based on their prejudgments about the need for the drug, may report improvements in the student's behavior when the teacher believes the student is taking it, even though the student is actually taking nothing. *Hearings*, *supra* at 343.

This points to another harm -- the student's belief that his/her acceptability, self-control, etc., depends upon a drug. Some children have called them "magic pills" because of increased popularity after taking them. *Wells*, *supra*, at 559.

There can also be serious medical consequences:

> The Physicians Desk Reference lists the possible side effects of Ritalin (methylphanidate hydrochloride): nervousness; insomnia; hypersensitivity [including an impressive list of skin disorders]; *anorexia*; nausea; dizziness; palpitations; headache; dyskinesia; drowsiness; blood pressure and pulse changes, both up and down; *tachycardia*; angina; cardiac arrhythmia; *abdominal pain*, and *weight loss during prolonged therapy*. (Emphasis indicates symptoms listed as most frequently found in children.) Possible suppression of growth is also reported. *Physicians Desk Reference*, 723 (30th ed. 1976). [Cited in *Jackson*, *supra*, at 185]

> Furthermore, there have been no long range studies on possible accumulation of toxic materials in the hyperkenetic child. While in the short run no chronic toxicity has appeared in studies, W. Wells, at 596, a recent study has hinted long term amphetamine use can cause death within five years for those suffering from an untreated blood disorder called necrotizing angillus. [Samuels, *supra*, at 344.]

Finally, there is some question about whether stimulants really have a paradoxical effect on children at all:

> Ritalin is a stimulant similar in effect to dexedrine. There has been a great deal of study of the so-called "paradoxical effect" mentioned by Congressman Gallagher, but some recent indications are that the effect of "speed" on children is not calming at all. Small doses of amphetamines often obtained illegally, help adults concentrate on boring tasks, as many college students will testify. This may be all that is happening to the young children, who take it before they go to school each day. If this is so, then it is, indeed, a paradox. [Jackson, *supra*, at 182.]

Legal Theories

Parental Rights Concerning Children's Upbringing

The Due Process Clause protects parents' liberty interest in the upbringing of their children. The Supreme Court has recognized that parents have the primary role in the custody, care, and nurturing of the child, although the state can interfere where the parents' interest is outweighed by the state's own interest in the health ahd welfare of the child and/or its interest in protecting other people. Compare:

Meyer v. Nebraska, 262 U.S. 390 (1923);
Pierce v. Society of Sisters, 268 U.S. 510 (1925);
Wisconsin v. Yoder, 406 U.S. 205 (1972);
with:
Prince v. Massachusetts, 321 U.S. 158 (1944).

For more extensive discussion, see Jackson, supra, at 183-87.

The Student's Constitutional Rights Regarding Bodily Intrusion and Control of Mental Processes

Involuntary medication arguably infringes upon three basic constitutional protections concerning the right to be left alone in terms of bodily intrusions and/or state attempts to control someone's thoughts:

First Amendment rights (see §I, especially §I.B.8, "Freedom of Conscience");
Privacy Rights (see §IV.A for basic principles);
Substantive due process liberty interests in freedom from intrusions on physical integrity and physical security (see §VIII.B, "Corporal Punishment and Similar Abuses").

See also the discussion, in §IV.E, "Collection of Student Information by the School," of Merriken v. Cressman, 364 F. Supp. 913 (E.D.Pa. 1973), where the court held that a school program designed to identify "potential drug abusers" among eighth grade students unconstitutionally invaded the privacy rights of students and parents and, further, extended beyond the school's authority into the exclusive privileges of parents

A series of cases have held that abuses concerning forced medication of institutionalized persons (juveniles, mental patients, the mentally retarded, etc.) have violated these rights concerning bodily intrusion or mind control, under one or more of the above constitutional provisions (or through analogous rights under the Eighth Amendment prohibition of cruel and unusual punishment, which itself does not apply to public schools):

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Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971);
Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973);
Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973);
Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974);
Scott v. Plante, 532 F.2d 939 (3rd Cir. 1976);
Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded*, ___ S.Ct. ___, 50 U.S.L.W. 4676 (6/18/82) (remanded for determination of state law issues);
Rennie v. Kline, 653 F.2d 836 (3rd Cir. 1981);
Welsch v. Likins, 373 F.Supp. 487 (D.Minn. 1974);
Pena v. New York State Division of Youth, 419 F.Supp. 203, 207 (S.D.N.Y. 1976);
Gary W. v. Louisiana, 437 F.Supp. 1209, 1224, 1229 (E.D.La. 1976);
Davis v. Hubbard, 506 F.Supp. 915 (N.D.Ohio 1980).

These cases, many of which also contain right-to-treatment principles (see §VIII.D, "Disciplinary Transfers"), often contain detailed medical and psychological discussions of drugs. All recognize a constitutionally protected interest in, or a right to, freedom from forced medication. They do, however, adopt a variety of conflicting standards as to when deprivation of that right is justified, and the law is obviously in flux, with some cases requiring a clear emergency danger of physical harm (e.g. *Davis*) and others allowing involuntary use for treatment reasons in some circumstances (e.g., *Rennie*). Any tendency toward accepting the latter, however, may not necessarily be applicable to non-institutionalized persons. These cases also often demand that any use of drugs be subjected to a least-restrictive-treatment inquiry, as well as other safeguards. For further analysis, see Jackson, *supra*, at 187-190; Samuels, *supra*, at 345-47; Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment," 72 *Nw.U.L.Rev*. 461 (1977); Rhoden, "The Right to Refuse Psychotropic Drugs," 15 *Harv.Civ. Rts.-Civ.Lib.L.Rev.* 363 (1980).

Procedural Rights

Since constitutional rights are fundamental liberties under the Due Process Clause, these same rights require that no medication be imposed without extensive procedural safeguards appropriate to the issues involved. See, e.g.,

Rogers v. Okin, *supra*;
Scott v. Plante, *supra*;
Winters v. Miller, *supra*;
Davis v. Hubbard, *supra*.

The procedural rights provided under federal handicapped laws, below, are relevant.

Ultra Vires

School officials may simply have no authority under state law to get involved in prescribing such drugs or requiring students to take them. See §VI.A (See also the discussion of parental rights, above.)

Assault and Battery

In some states, forcing the ingestion of a drug may constitute a battery. See §VIII.B, "Corporal Punishment and Similar Abuses;" and §VI.D, "Tort Actions." But see Rogers v. Okin, supra, 478 F.Supp. at 1383-84, where the court said that malpractice concepts were more appropriate than intentional tort concepts when dealing with physicians acting in good faith in mental hospitals. This reasoning may not apply, however, to non-medical school officials who involve themselves in such coercion.

Negligence/Malpractice

School officials (and private doctors working with them) who involve themselves in prescribing and requiring medication can and should be held to the same negligence/malpractice professional standards as in any other medical context. See Rogers v. Okin, supra, 478 F.Supp. at 1384-88; and §VI.D, "Tort Actions."

Circumvention of Special Education Laws

School officials who recommend or require that students take stimulants to deal with hyperactivity are clearly treating those students as "handicapped," as defined in the regulations for the Education for All Handicapped Children Act (34 C.F.R. §300.5) and §504 of the Rehabilitation Act (34 C.F.R. §104.3). Under those acts, students' special needs can only be addressed through individualized education plans which are drawn up in conformity with all requirements of those acts, including evaluations; parental notice, involvement, and consent; appropriateness; least restrictive alternative; and due process safeguards. See §III.C.

Consent

Assuming that the school system cannot normally meet its heavy burden of demonstrating the compelling need to coerce students to take medication, the focal point becomes consent -- of the parent and, arguably, the student (at least above a certain age). See Merriken v. Cressman, supra, where the court pointed to the failure to obtain both student and parent consent in collecting the information to identify "potential drug abusers" in the eighth grade. See also privacy cases in §IV.A.

In Merriken v. Cressman, supra, the court held that there was no "knowing, intelligent, voluntary and aware consent of parents or students" (364 F.Supp. at 922), because of such factors as the absence of opportunity for parents to see the questionnaire beforehand, the explanation given to parents being promotional and designed to win their acquiescence, the failure to inform parents of potential dangers prior to consent, and the presumption of consent from parents' silence.

Given the arguments above concerning medication and special education, the school system would have to meet the terms of the Education for All Handicapped Children Act regarding notice and consent before evaluating the student for, or designing a program which includes, medication. 34 C.F.R. §300.505 provides:

> (a) The notice under §300.504 must include:
> (1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;
> (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;
> (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and
> (4) A description of any other factors which are relevant to the agency's proposal or refusal.
> (b) The notice must be:
> (1) Written in language understandable to the general public, and
> (2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
> (c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:
> (1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
> (2) That the parent understands the content of the notice, and
> (3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

The fact that the school has obtained informed and voluntary consent, however, will not excuse it from meeting all the other requirements of the handicapped laws (evaluation, individualized education plan, appropriateness, least restrictive environment, due process safeguards, etc.) or the requirements of good medical practice. Beyond this, given that students, unlike some institutionalized persons, are in the custody of their parents and are not wards of the state, it can be argued, under the parental liberty rights and ultra vires principles above, that such medication is not the province of the school at all and school officials or school physicians should not even be recommending its use. See the settlement in *Benskin*, below.

Successful Settlement

■ In September, 1975, students filed suit against a school district in California for coercing parents into consenting to the use of Ritalin. Plaintiffs used several of the theories above, as well as claims that the district misused Title I federal funds in purchasing the drugs and violated state and federal narcotics laws in giving students pills out of their classmates' prescriptions. The students alleged a variety of temporary and permanent side-effects. A settlement agreement was signed in the case, *Benskin v. Taft City School District*, C.A. No. 136795 (Cal.Super.Ct., Kern County, 5/16/80) (Clearinghouse No. 16,431).

Under the agreement, defendants' insurers, without admitting any liability, shall pay "$210,000 to such of the individual named plaintiffs in such individual amounts as hereafter ordered by the Court." Every parent in the district is to receive a letter stating that no child will be excluded or otherwise reassigned because of parental refusal to consent to any medication and that the decision to provide medical treatment is the parents' alone, in consultation with their own physician. School staff are to be notified that they shall avoid any encouragement or support for use of behavior-modifying drugs and that they may not recommend or influence a decision to use such drugs. The district is to notify parents whose children receive Ritalin in accordance with state law of governmental determinations that it may have "dangerous side-effects" and that children taking it should "have a complete physical examination, and regular follow-up examinations several times a year." In-service training in "non-medical means of dealing with behavior orlearning problems" shall continue. School physicians "will screen and refer but will not diagnose or prescribe any behavior-modifying drugs." (Other provisions omitted.)

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L. EXCLUSION FROM SCHOOL BUS

Exclusion from the school bus as a disciplinary measure may amount to exclusion from school for students who have no access to other transportation, in which case it should be analyzed in the same terms as other exclusions. See §VIII.A. The most relevant theories for challenging the penalty as substantively inappropriate will likely be ultra vires, equal protection, or (once a liberty or property interest has been demonstrated) due process. (See §VI.) Where the exclusion does not prevent the student from attending school, those theories may still apply, but challenges will be more difficult. (See §X.K.)

In Rose v. Nashua Board of Education, 506 F.Supp. 1366 (D.N.H. 1981) (on appeal), a student challenged the suspension of bus routes for up to five days because of vandalism, throwing burning papers, and breaking window of passing car with snowball. Although the court recognized a property interest in bus transportation created by state statute (see §X.K), it found that the suspension was not an arbitrary or unreasonable denial of substantive due process. (In refusing to limit the school to only suspending misbehaving students and not the entire bus route, the court failed to take account of the principles concerning punishment on the basis of individual guilt. See §VII.E.) See also:

Shaffer v. Board of School Directors, 522 F.Supp. 1138 (W.D.Pa. 1981) (on appeal) (providing bus transportation to kindergarten in only one direction as a cost-saving measure arbitrarily burdened indigent children's property interests in education, in violation of substantive due process, and denied them equal protection);

Shrewsbury v. Board of Education, 265 S.E.2d 767 (W.Va. 1980) (denial of equal protection to refuse to provide bus transportation to certain students because of their distance from easy access roads).

For discussion of procedural rights concerning exclusion from the bus, including relevant property interests, see §X.K.

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RIGHTS

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IX. GENERAL PRINCIPLES

A. WHEN ENTITLED TO DUE PROCESS: PROPERTY/LIBERTY INTERESTS

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV.

As the Fourteenth Amendment itself indicates, the first step in analyzing a due process case is determining whether the student has been deprived of a liberty or property interest. In Goss v. Lopez, supra, the Supreme Court held that suspensions of ten days or less entitle students to due process because they deprive students of their property interest in public education (an entitlement granted by the state) and their liberty interest in their good name, reputation, honor, or integrity. The Court also reiterated that, once a liberty or property interest is at stake, a student is entitled to due process regardless of the extent or severity of the deprivation -- unless the deprivation is merely "de minimus" (i.e., so minor as to be a mere trifling matter). A short suspension is not "de minimus." The extent of the deprivation will, however, affect the particular kind of due process to which the student is entitled (see §IX.B.). These basic principles, as well as other liberty interests which may be affected by various disciplinary actions, are discussed below.

Property Interests

"At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

* * * *

"Here on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code §§3313.48 and

§3313.64 direct local authorities to provide a free education to all residents between six and 21 years of age, and a compulsory attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code §3321.04. It is true that §3313.66 of the code permits school principals to suspend students for up to two weeks; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred. Arnett v. Kennedy, supra, at 164 (Powell, J., concurring); 171 (White, J., concurring and dissenting); 206 (Marshall, J., dissenting).

"Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door. Tinker v. Des Moines Community School District, 393 U.S. 503, 506 (1969). 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures. . . Boards of Education not excepted.' West Virginia v. Barnette, 319 U.S. 624, 637 (1943). The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause."

Goss v. Lopez, 419 U.S. 565, 572-74 (1975).

". . . A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

"A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. . . . Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' . . . And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' . . .

". . . We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the policies and practices of the institution.'"

Perry v. Sindermann, 408 U.S. 593, 601-03 (1972).

". . . the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."

Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

Liberty Interests

"The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the clause must be satisfied. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth*, *supra*, at 573. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution."

Goss v. Lopez, *supra*, 419 U.S. at 574-75.

In addition to the liberty interest in reputation, the Supreme Court has previously recognized that government action may threaten other liberty interests protected by due process, including action which:

(1) abridges an individual's other constitutional rights, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); such as freedom of association, *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958); and privacy, *Roe v. Wade*, 410 U.S. 113, 153 (1973) [see (4) below];

(2) imposes upon an individual "a stigma or other disability that foreclose(s) his freedom to take advantage of other employment opportunities," *Board of Regents v. Roth*, 408 U.S. 564 573-74 (1972);

(3) deprives a person of the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge," *Roth*, 408 U.S. at 572; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923);

see Grove v. Ohio State University, 424 F.Supp. 377, 382 (S.D.Ohio 1976); Cox v. Northern Virginia Transportation Commission, 551 F.2d 555, 558 (4th Cir. 1977);

(4) deprives a person of the liberty interest in the "right of personal privacy" which "includes 'the interest in making certain kinds of important decisions,'" including "personal decisions 'relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education. . . ;'" Carey v. Population Services International, 97 S.Ct. 2010, 2016 (1977); and cases cited therein;

(5) intrudes "on personal security" or imposes "bodily restraint and punishment;" Ingraham v. Wright, 97 S.Ct. 1401, 1413-14 (1977).

For more on protected interests, see:

Meyer v. Nebraska, supra;
Bolling v. Sharpe, 347 U.S. 497, 499 (1954);
Stanley v. Illinois, 405 U.S. 645 (1972);
Vitek v. Jones, 100 S.Ct. 1254 (1980).

The Supreme Court has qualified the extent to which the liberty interest in one's good name and reputation can be relied upon, stating that damage to "reputation alone" does not require due process in the absence of some governmental action against the person whose reputation is being damaged. Paul v. Davis, 424 U.S. 693 (1976). Subsequent decisions, however, have applied Paul v. Davis to find a due process liberty interest at stake where the government has damaged reputation in the process of taking significant action against a person, such as refusal to rehire, dismissal from a job, or discharge from the military -- even when there is no property interest in the job or military status. See:

Codd v. Velger, 97 S.Ct. 882, 883-84 (1977);
Owen v. City of Independence, Mo., 100 S.Ct. 1398, 1406-07 n.13 (1980), aff'g, 560 F.2d 925, 934-37 (8th Cir. 1977);
Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976);
Huntley v. Community School Board, 543 F.2d 979, 984-86 (2nd Cir. 1976);
Cox v. Northern Virginia Transportation Commission, supra;
Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338 (5th Cir. 1978);
Larry v. Lawler, 605 F.2d 954, 957-59 (7th Cir. 1978);
Marrero v. City of Hialeah, 625 F.2d 499, 512-13 and n. 17 (5th Cir. 1980);
Stevens v. Joint School District No. 1, 429 F.Supp. 477, 485-86 (W.D.Wis. 1977).

This interest comes into play only if the damaging information is disclosed to others. Bishop v. Wood, 426 U.S. 341 (1976). Further, where the only protected interest at stake is the interest in reputation because of what the government is doing to the individual, it may also be necessary to allege that the charges are false in order to obtain a hearing. Codd v. Vegler, supra.

Application to School Decisions Other Than Suspension

The protected interests which trigger due process when a student is suspended arguably are also at stake in a large number of other school decisions. This point was made by Justice Powell in his dissent in Goss, supra, 419 U.S. at 597:

> . . . Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.
>
> In these and many similar situations, claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injury given critical weight in this case.

Before assuming that each of these decisions requires the same due process procedures applicable to suspension or expulsion, however, the reader should carefully check the relevant section in §X, "Application to Specific Forms of Discipline," below.

Right to Due Process Depends Upon Existence of Liberty/Property Interest -- Not on the Severity of the Loss (Unless "De Minimus")

"Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the clause comes into play only when the State subjects a student to a 'severe detriment or grievous loss.' the loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellee's argument is again refuted by our prior decisions; for in determining 'whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.' Board of Regents v. Roth, supra, at 570-71. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. Fuentes v. Shevin, 407 U.S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Sniadach v. Family Finance Corp. 395

U.S. 337, 342 (Harlan. J., concurring); Boddie v. Connecticut, 401 U.S. 371, 378-379; Board of Regents v. Roth, supra, p. 570 n.8. A 10-day suspension from school is not de minimus in our view and may not be imposed in complete disregard of the Due Process Clause.

"A short suspension is of course a far milder deprivation than expulsion. But, 'education is perhaps the most important function of and local governments.' Brown v. Board of Education, 347 U.S. 483, 493 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

Goss v. Lopez, supra, 419 U.S. at 575-76.

B. WHAT KIND OF DUE PROCESS: BALANCING TEST

"Once it is determined that due process applies, the question remains what process is due."
Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Overview

As elaborated in the quotations and discussion below, the nature of the due process required will vary with the nature of the case. Factors to be considered are the seriousness of the liberty or property deprivations, the kind of procedures that are most appropriate to deciding the issues at hand, and the administrative burden. The basic aim is to minimize the risk of erroneous decisions. The Supreme Court has reiterated that, whatever the outcome of this balancing test, due process requires some kind of notice and hearing. The Court has created two recent exceptions to that requirement (corporal punishment and academic evaluation), but has still continued to state the requirement as a general rule in other contexts.

Supreme Court Opinions

"[T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)... .

"There are certain bench marks to guide us, however. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), a case often invoked by later opinions, said that 'many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313. '[T]he fundamental requisite of due process of law is the opportunity to be heard,' Grannis v. Ordean, 234 U.S. 385, 394 (1914), a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' Mullane v. Central Hanover Trust Co., supra, at 314. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168-169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 68 U.S. 223, 233 (1863).

"It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers v. McElroy*, *supra*, at 895; *Morrissey v. Brewer*, *supra*, at 481. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. . . . The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process."

Goss v. Lopez, 419 U.S. 565, 577-80 (1975).

"This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, *e.g.* *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75L.Ed. 1289 (1931). See also *Dent v. West Virginia*, 129 U.S. 114, 124-125, 9S.Ct.231, 234, 32 L.Ed. 623 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914).

". . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022."

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

Some Form of Notice and Hearing

The requirement that notice and hearing occur before a suspension or other exclusion, except in emergency situations, is a holding of the Supreme Court in *Goss*, *supra*, 419 U.S. at 582. In *Ingraham v. Wright*, 97 S.Ct. 1401, 1414-18 (1977), the Court held that, while students subjected to corporal punishment are entitled to due process, this need not include a hearing in that adequate due process protection is provided (in view of the alleged "low incidence of abuse" and "openness of our schools") by the students' right to sue in state court afterwards (e.g., for assault and battery). The empirical assumptions and legal reasoning of this decision have been subjected to severe criticism elsewhere. See, for example, Thomas J. Flygare, "Ingraham v. Wright: The Return of Old Jack Seaver," 23 Inequality in Education 29 (September 1978). In Board of Regents v. Horowitz, 98 S.Ct. 948 (1978), the Court held that university dismissals for academic, as distinguished from disciplinary, reasons do not require hearings because other forms of due process (assuming due process is required) are sufficient and more appropriate for academic matters. These decisions should have quite limited applicability beyond corporal punishment and academic decisions. Note that, subsequent to these decisions, the Supreme Court has continued to reaffirm the holdings in Goss, Mathews, and Wolff, supra, that due process requires, at a minimum, that people being deprived of property or liberty interests must be given opportunity for some form of notice and hearing, and that this notice and hearing occur before the deprivation unless a genuine emergency exists:

Smith v. Organization of Foster Families, 97 S.Ct. 2094, 2111-12 (1977);
Memphis Light, Gas & Water Division v. Craft, 98 S.Ct. 1554, 1563 (1978).

Compare:
Parratt v. Taylor, 101 S.Ct. 1908 (1981) (where action which deprives person of property is negligent rather than intentional, such as where the state negligently loses property, a post-deprivation procedure which provides opportunity for full compensation is sufficient; this exception will generally not be relevant to acts of school discipline, which are almost always intentionally imposed).

In any event, the Goss ruling makes it clear that hearings are required for disciplinary exclusions, and that such hearings must precede the exclusion except where emergency conditions require that the hearing be postponed until the student is removed to preserve order or protect physical safety. See §XI.A on prior hearings and emergency suspensions.

Arguing for More Extensive Procedures -- The Mathews v. Eldridge Factors

In deciding upon what kind of notice and hearing is required (or what other form of due process is required in those limited situations where notice and hearing are not mandatory), the three factors listed in Mathews v. Eldridge, supra, are the key, particularly in dealing with discipline other than lengthy exclusions, where the law is already fairly well-developed.

The Private Interests at Stake

First -- in terms of the private interest that will be affected -- it is generally recognized that longer exclusions, being more serious deprivations of liberty and property interests, entitle the student to additional procedural safeguards beyond those mentioned in Goss. See cases cited in §X.B, "Long-Term Suspension/Expulsion;" as well as the citations throughout §XI, "Specific Elements."

In addition to the length of the exclusion, however, there are other factors which may affect the private interest at stake. For instance, more serious charges, which will appear on the student's record, represent a greater deprivation of liberty interests even when the length of the exclusion is the same (e.g., the difference between a three-day suspension for smoking and a three-day suspension for stealing or for assault). See:

Smyth v. Lubbers, 398 F.Supp. 777, 796-97 (W.D.Mich. 1975) (charge of drug possession triggers more formal procedures);
McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977) (in teacher discharge case, fact that "the matters in question touched on morality and professional capacity and plaintiff's livelihood" affects the procedural elements required).

Possible restriction on the exercise of other constitutional rights can also increase the needed degree of procedural formality. See PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303, Slip Op. at 8-9 (N.D.Ill., Nov. 5, 1975) (Clearinghouse No. 17,507) (suspensions potentially beyond 10 days), rev'd in part on other grounds sub nom. Piphus v. Carey 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), rev'd on other grounds, 98 S.Ct. 1042 (1978) (reversed on damages issue), where the court stated in regard to a suspension for refusing to remove an earring, which the student asserted was a symbol of black pride. "Additionally, the first amendment implication of the Brisco case also warrants stricter procedural safeguards before a suspension can be imposed."

Finally, a short exclusion or other punishment may in fact be a more serious deprivation if additional penalties result -- for instance, because the student will miss a particularly important event, such as an exam which cannot be made up or an important extracurricular event, or because academic penalties, such as a zero for each day, are imposed on suspended students. Jones v. Latexo Independent School District, 499 F.Supp. 223, 239 n.15 (E.D.Tex. 1980). In Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972), the court noted:

> . . . the "magnitude" of a penalty should be gauged by its effect upon the student and not simply meted out by formula. For example, a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final exam that provided for no "make-up."

Kinds of Procedures Needed to Minimize Mistakes

In assessing the second factor in Mathews -- "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" -- an important focus is the extent to which issues are in dispute. If, for instance, a principal tells a student that a teacher has accused him/her of doing something and the student outright denies it, there is probably no basis for making a decision which is not arbitrary or based upon prejudgment, and which thus fulfills the due process duty to provide meaningful protection against the risk of error, without doing more -- bringing in witnesses who saw the event, giving both sides a chance to question the other, etc. See:

> Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education*, 42, 44 (1975);
>
> William R. Hazard, "Goss and Wood: More and Better Due Process Required," in Anson and Kuriloff, eds., *Student's Right to Due Process: Professional Discretion and Liability under Goss and Wood*, 71, 73-77 89-93 (Education Resources Division, Capitol Publications, Inc., 2430 Pennsylvania Ave., N.W., Washington, D.C. 20037).

Cf: *McNaughton v. Circleville Board of Education*, 345 N.E.2d 649, 656 (Ohio Ct. Common Pleas 1974) (if students had denied the accusations, more formal proceedings might have been required). (However, see comments to §III.G.2, "Findings: Determination of Penalty," on the student's right to an adequate hearing on the appropriateness of the penalty even when there is no dispute as to the existence of misconduct.)

In *McGhee*, *supra*, 564 F.2d at 912, the court stated that one factor requiring certain elements of due process was "that the disputed facts turned largely on the word of individuals." Similarly, Hazard notes, at 75,

> It would appear wise for the disciplinarian . . . to require direct evidence from the teacher or other school official to corroborate the oral or written account of the student's alleged misconduct. The common practice in most schools is to refer suspension decisions to the school principal, although he or she is rarely a witness to the student's misconduct. A principal's reliance on a cryptic note or hurried conversation with the teacher or other staff member would seem to be a risky basis for even a short suspension.

The Center for Law and Education's *The Constitutional Rights of Students*, 226 (1976), points out two other examples of situations in which the risk of a wrong decision may require additional procedures: "short suspensions involving racial altercations where an abbreviated procedure might be interpreted by one faction as unduly favoring the other;" and "short suspensions initiated by a teacher against whom students have lodged an unresolved complaint relating to that teacher's fairness in dealing with students."

The Government's Interests

In addressing the third *Mathews* factor -- "the Government's interest," including "fiscal and administrative burdens" which additional procedures would impose -- it will be helpful to demonstrate that the particular procedures are not unworkable and will not be used that often (or, if the system were to operate more justly and rely more on non-punitive solutions, would not have to be used that often).

It can also be demonstrated that certain procedures may in the long run reduce administrative headaches -- for instance, requirements that notice and findings be written or that the hearing be recorded can minimize lengthy disputes about what happened or what was communicated; parent participation in informal hearings may in the long run be simpler than dealing with the anger of parents who are notified after a decision has been reached. The costs to the state of unwarranted exclusion can also be described in terms of its connection to dropping out, vandalism and violence, disrespect for and retaliation against an arbitrary school order, etc. Moreover, independent of administrative or fiscal concerns, the government has an interest in keeping students in school, as evidenced by, e.g., compulsory attendance laws. As the Supreme Court stated, "[I]t disserves both [the student's] interest *and the interest of the State* if his suspension is in fact unwarranted." *Goss v. Lopez*, *supra*, 419 U.S. at 579 (emphasis added).

In any event, the government's interest is only one of the three factors which must be balanced, and it cannot justify procedures which fail to serve the basic purpose of due process: "to avoid unfair or mistaken" decisions and to "provide a meaningful hedge against erroneous action." *Id*. at 579, 583.

* * * *

Analysis of the three factors above should be brought to each of the forms of discipline discussed in §X, once it has been demonstrated that property or liberty interests are at stake.

X. APPLICATION TO SPECIFIC FORMS OF DISCIPLINE

A. SUSPENSION FOR TEN DAYS OR LESS

Overview

The Supreme Court has held that students facing suspension of ten days or less are entitled to notice and hearing. Goss v. Lopez, 419 U.S. 565 (1975). The notice and hearing must occur prior to the suspension, except in genuine emergencies where the student's continued presence poses an ongoing danger of physical harm to persons or property or of serious disruption of the academic process, in which case the hearing must be held as soon as possible after the suspension begins. The Court held that the required procedures include, at a minimum, oral or written notice of the charges, an explanation of the evidence supporting those charges, and an opportunity for the student to present his/her side of the story. There are, however, certain other procedural rights which are arguably basic to any suspension hearing. Further, the Court left open the possibility that, in unusual circumstances, more elaborate procedures may be required. The factors which the Court has developed for what kind of due process is warranted will help to address these "unusual" suspensions. Using these factors, additional procedures may be called for when there are significant factual disputes or when the short suspension results in "unusual" harm to the student.

Basic Right to Notice and Hearing

" . . . At the very minimum, therefore students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

* * * *

" . . . Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."

Goss v. Lopez, 419 U.S. 565, 579, 581 (1975).

The Court stated that this right applies to any suspension "for more than a trivial period" (Id. at 576) or "of 10 days or less" (581). According to Justice Powell, it applies to any suspension "for as much as a single day." (Id. at 585 and n.3, Powell, J., dissenting.) See also:

Hillman v. Elliot, 436 F.Supp. 812 (W.D.Va. 1977) (three-day suspension is more than "de minimus");

Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D.Mich. 12/29/78) (jury award of $100 for a one-day suspension without a hearing upheld as proper);
Shanley v. Northeast Independent School District, 462 F.2d 960, 967 n.4 (5th Cir. 1972) (court discusses the serious nature of three-day suspensions).

For more on the basic right to a hearing, see §IX.A and B.

Prior Hearing -- Except for Emergencies

As a general rule, the notice and hearing must occur before the suspension is imposed. *Goss*, *supra*, 419 U.S. at 582. However,

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated. [*Id*. at 581-82.]

The outside deadline in such emergencies is three days. *Lopez v. Williams*, 372 F.Supp. 1279 (S.D.Ohio 1972), *aff'd*, *Goss*, *supra*, 419 U.S. at 572.

Overreliance on "emergency" suspension has become one of the greatest abuses in some districts since the *Goss* decision. For more on this issue, see §XI.A, "Prior Hearings and the Emergency Exception."

Other Rights in Any Short Suspension Hearing

There are certain other rights which arguably apply to any suspension. They were alluded to in *Goss*, but in a less obvious way than the rights stated above. Other decisions and basic due process principles also indicate that they are essential for any fair hearing.

Impartial, Independent Determination of Specific Misconduct

"Although the procedures in the simple suspension are relatively informal it cannot be emphasized too strongly that the entire thrust of the requirement is to insure that there is a genuine fact-finding process which is a 'meaningful hedge' against erroneous action. [419 U.S. at 583.] This being the case it would seem that three common practices of school officials are now implicitly prohibited.

"First, the person making the decision must be relatively free from bias. Thus, minimally, if the person involved in the decision to suspend is involved in the alleged incident he or she cannot determine guilt. Although passive observance would likely not result in disqualification to decide the issue, the court did note that observation did not obviate the need to follow the procedures. [*Id*. at 584.]

"Second, no longer may a teacher or other adult's words be given an irrebutable presumption of truthfulness. In *Goss* there was testimony, alluded to by Mr. Justice White, by a principal that in the common suspension a teacher would tell him one thing and a student another. When asked how he resolved this conflict he replied, 'Then the teacher's word would be the deciding factor.' Such a resolution is clearly contrary to the spirit of *Goss* and would now be prohibited. Indeed, if the issue boiled down to such a confrontation and could not be resolved without resort to this impermissible presumption, seemingly the suspension would move from a 'simple' to an unusual short-term suspension. (See below.)

"Third, there must now be a fact-finding determination which precedes a determination of what to do about the child. Commonly these concerns get mixed up and the determination of whether the student was guilty of the act charged gets lost in the process. A determination of guilt for a specified offense based upon evidence is, under *Goss*, a prerequisite for a suspension. This prerequisite must be met before school officials can properly determine if a suspension or some other alternative is in the 'best interest' of the child."

Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 *Inequality in Education* 42, 43-44 (July 1975).

The basic requirement of impartiality is discussed in §XI.E. The right to a presumption of innocence, rather than a presumption of guilt, is discussed in §XI.F.7. On separating the finding of guilt or innocence from the later determination of what action to take, see §XI.G.1. The absence of an impartial review of the facts and a specific determination of misconduct would make the hearing a meaningless charade rather than the protection "against unfair or mistaken findings of misconduct and arbitrary exclusion from school" which the Court identified as the purpose of the hearing. (*Id.* at 581. See also 580-81 n.9.)

Parent's Right to Due Process

The three-judge lower court in *Goss*, after setting out the right to notice and hearing, and declaring that these rights must be afforded before the suspension decision (except in emergencies), held that the required notice and hearing were to be provided to the parent as well as the student. *Lopez v. Williams*, 372 F.Supp. 1279, 1299-1300, 1302 (S.D.Ohio 1979). While parental involvement was not discussed elsewhere in the Supreme Court's opinion, the Court explicitly cited the holdings of the three-judge court, including this requirement, and then stated, "We affirm." *Goss*, *supra*, 419 U.S. at 572.

Other lower courts have stated that, for short suspensions, prior notice with opportunity for hearing should go to the parent as well as the student.

Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972);
Mills v. Board of Education, 348 F.Supp. 866, 832 (D.D.C. 1972);
Vail v. Board of Education, 354 F.Supp. 592, 603 (D.N.H.), *remanded for additional relief*, 502 F.2d 1159 (1st Cir. 1973);
Graham v. Knutzen, 362 F.Supp. 881, 885 (D. Neb. 1973).

Cf: *Brown v. Board of Education of Tipton County*, C.A. No. 79-2234-M (W.D.Tenn. 5/3/79) (Clearinghouse No. 26, 964H) (notice of short suspension to parents must describe the charges and the procedure for obtaining a review of the decision);
Kraut v. Rachford, 51 Ill.App.3d 206, 366 N.E.2d 497, 503 (Ill.App. 1977) (student dropped from enrollment on grounds of non-residency; speaking of due process generally, court stated, "where the interests of a minor student are involved, his parents should be notified of the pending action").

Further, some form of due process should be required for parents, given the Supreme Court's long-standing recognition that parents have a liberty interest in their children's education protected by the Due Process Clause.

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923);
Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
See: *Sullivan v. Houston Independent School District*, 307 F.Supp. 1328, 1343 (S.D.Tex. 1969).

Also, most states have statues making the parent responsible for the child's attendance under compulsory attendance laws. *Sullivan*, *supra*. [By the same reasoning, parental notice and hearing would not be required for students who are not minors. *Morale v. Grigel*, 422 F.Supp. 988, 1003 (D.N.H. 1976).]

"Unusual" Circumstances Requiring Additional Procedures

> " . . . Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."
>
> *Goss v. Lopez*, *supra*, 419 U.S. at 584.

For the "usual" short suspension, the Court stated that "[T]hat there need be no delay between the time 'notice' is given and the time of the hearing;" and that, in such "usual" cases. the Due Process Clause did not "require, countrywide, that hearings . . . must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his account of the incident." 419 U.S. at 582, 583. In "unusual" situations, however, the right to meaningful due process may require adequate time to prepare and certain of these additional rights. The Supreme Court has stated that the opportunity to be heard "is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 85 S.Ct. 545, 552 (1965).

The key to assessing "usual situations" is using the three factors in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), which the Supreme Court has developed for determining "what process is due" -- (1) the private interest at stake; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens" which additional procedures would impose. In applying these factors to short suspensions, see also the statement in Goss that "the timing and content of the notice and the nature of the hearing will depend upon appropriate accomodation of the competing interests involved" (419 U.S. at 579). Thus, the bare minimum requirements stated in Goss for any suspension hearing should not be regarded as a bar to additional procedures when warranted by this analysis. Application of the Mathews factors to school discipline is discussed in detail, with other case citations, in §I.B., "What Kind of Due Process." See also:

Hillman v. Elliot, 436 F.Supp. 812 (D.C.Va. 1977) (after viewing the "totality of the circumstances," court upheld three-day suspension where student was afforded three different hearings and two appeals, notice of each of the hearings and appeals was sent to both the student and his parents, student was given the opportunity to be represented by counsel, to examine witnesses, and to present evidence and testimony, and the student was allowed to remain in school pending the outcome of the hearings);

Pegram v. Nelson, 469 F.Supp. 1142 (N.D.Ill. 1979) (upholding ten-day suspension where both the student and his parent were given informal hearings, access to written statements, the names of possible witnesses, and the opportunity to talk to each of these persons).

Factual Disputes

Under the second factor in Mathews, significant factual disputes should trigger additional procedures -- such as bringing in other witnesses who saw the event, giving both sides a chance to question each other formally, etc. -- for otherwise the administrator will have no real basis for a decision, except for improper reliance on the presumption that the student is always wrong and the staff always right. Cases and commentators supporting the need for more procedures where factual issues are in dispute are cited in §IX.B., in the subsection titled "Kinds of Procedures Needed to Minimize Mistakes."

Short Suspensions Resulting in "Unusual" Injury to Student's Interests

Certain short suspensions, even when of the same length as the "usual" suspensions discussed in Goss, may nevertheless involve greater deprivations of property or liberty interests, thus requiring more extensive protection under the first factor in Mathews -- the private interests at stake. This could include, for example, short suspensions in which:

- the charges which will be recorded are unusually damaging to the student's liberty interest in his/her reputation (such as criminal or sexual misconduct);
- other constitutional rights, such as rights of free expression may be at stake;
- the student will miss a particularly important event, such as an exam which he/she will not be permitted to make up or an important extracurricular event;
- academic penalties are imposed, such as grade reductions or zeros for each day of absence.

In cases where the student loses credit for a course or a term because of the suspension (through grade reductions or denial of opportunity to make up exams), the suspension should be treated, for due process purposes, as functionally equivalent to exclusion for the entire course period rather than for only a few days.

Cases and comments supporting the need for more procedures in the face of these additional injuries are found in §IX.B., in the subsection titled "The Private Interest at Stake."

Other Situations Warranting More Procedures

Using the *Mathews* analysis, it can be argued that more procedural protection should be provided in two other situations:

- where serious issues of fairness have been raised, such as charges of racial prejudice in the discipline process;
- where evidence presented in the disciplinary hearing may be used in a pending juvenile court proceeding with much more serious consequences (in which case protection of the student might require the right to an attorney, exclusion of improperly acquired evidence, protection against self-incrimination, etc.).

Pre-Goss Decisions Granting More Extensive Rights

Certain lower courts, prior to the ruling in *Goss*, applied more extensive procedural requirements to exclusions of less than ten days, even without "unusual" circumstances. These decisions may still carry at least some weight in the jurisdictions in which they were decided, for when the Court in *Goss* said it would stop short of requiring "countrywide" the right to counsel, confrontation, cross-examination and presentation of witnesses (419 U.S. at 583), the Court may have been allowing room for these more localized decisions. In any event, these cases are still valid for suspensions beyond ten days. (The cases are cited throughout §XI, "Specific Elements of Due Process.") Further, the discussion above points to the need for some of these procedures in the "unusual situations" to which the Court alludes.

B. LONG-TERM SUSPENSION/EXPULSION

As the Supreme Court noted after discussing procedures applicable to suspensions of ten days or less, "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Goss v. Lopez, 419 U.S 565, 584 (1975). This is consistent with the Court's general analysis in Mathews v. Eldridge for determining what procedures are required, under which the first factor to be considered is the private interest at stake. 424 U.S. 319, 335 (1976). (See analysis in §IX.B., "What Kind of Due Process.") The Court in Goss, after finding that a short suspension is itself a serious deprivation of property and liberty interests, noted, "A short suspension is of course a far milder deprivation than expulsion." 419 U.S. at 576.

Courts applying the principles set forth in Goss since that decision have thus consistently found that more extensive procedural safeguards are required for exclusions beyond ten days.

Morale v. Grigel, 422 F.Supp. 988, 1002 (D.N.H. 1976)
(exclusion beyond ten days);
M. v. Board of Education, 429 F.Supp. 288, 290 (S.D.Ill. 1977)
(expulsion);
Gonzales v. McEuen, 435 F.Supp. 460, 466-467 (C.D.Cal. 1977)
(expulsion for remainder of year);
Dillon v. Pulaski County Special School District, 468 F.Supp.
54, 57-58 (E.D.Ark. 1978), aff'd, 594 F.2d 699 (8th Cir. 1979);
Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., Mar. 31, 1975)
(expulsion with opportunity to be in G.E.D. night program);
PUSH v. Carey, C.A. Nos. 73-C-2522 and 74-C-303, Slip Op. at 8
(N.D.Ill. Nov. 5, 1970), rev'd in part on other grounds sub nom.
Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976) (reversed because
of court's failure to award damages to students), rev'd and
remanded on other grounds, 98 S.Ct. 1042 (1978) (reversed court
of appeals on damages issue) ("suspensions potentially exceeded
10 days, triggering the need for more formal procedures");
Giles v. Redfern, C.A. No. _____, Slip Op. at 11-12, (N.H.Super.Ct.,
Cheshire County, Jan. 18, 1977) (Clearinghouse No. 20,624A)
(suspension for remainder of semester).

The many decisions prior to Goss which required extensive procedures for exclusions of various lengths are also still good law, at least as applied to exclusions beyond ten days. (These decisions are cited throughout §XI, "Specific Elements.")

It was on the basis of just such continuity and consistency that the post-Goss court in Morale v. Grigel, supra, 422 F.Supp. at 1002, referred back to its pre-Goss decision for the requirements for lengthy suspensions:

> This court has already addressed the issue of what process is due in a school disciplinary hearing. *Vail v. Board of Education of Portsmouth School Dist.*, 354 F.Supp. 592, 603-604 (D.N.H. 1973), *aff'd in part*, 502 F.2d 1159 . . . It is against this standard of due process that I must measure the process received by Morale.

For substantive challenges to suspensions and expulsions, see §VIII.A, "Exclusion (Suspension, Expulsion, Etc.)"

C. DISCIPLINARY TRANSFER

"I conclude that such transfers [lateral transfers from one non-disciplinary school to another] involve protected property interests of the pupils and are of sufficient significance as to warrant the shelter of due process protection . . . .

"In theory a transfer from one school to another within the same school district does not reduce the educational opportunities of the transferred pupil. All schools are intended to be approximately equal as to educational quality and physical facilities offered . . . . There is no inherent right of the pupil to attend the school of his or her choice, or the choice of the parents, within the school district.

" . . .[A] transfer during the school year has, at least to many pupils, a serious adverse impact upon their educational progress. The terminology of a "disciplinary" transfer suggests punishment. Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment. . . .

" . . . A suspension, under *Goss*, 'is a serious event in the life of the suspended child.' No less so is a disciplinary transfer to another school 'a serious event in the life the [transferred] child.' *Goss v. Lopez*, [419 U.S. 565,] at 576. To transfer a pupil during a school year from a familiar school to a strange and possibly more distant school would be a terrifying experience for many children of normal sensibilities. I think it not melodramatic to suggest the genuine danger of physical harm being intentionally inflicted upon a transferred pupil who may be required to pass through different and strange neighborhoods on the way to and from the transferee school. Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities. Realistically, I think many if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer, especially if the transferee school was farther from home or had poorer physical or educational facilities."

Everett v. Marcase, 426 F.Supp. 397, 400
(E.D.Pa. 1977).

Several courts have held that students subject to disciplinary transfers to other schools are deprived of significant property or liberty interests and are entitled to notice and due process hearings similar to those required for expulsions.

Betts v. Board of Education, 466 F.2d 629 (7th Cir. 1972);
Mills v. Board of Education, 348 F.Supp. 866, 880-883 (D.D.C. 1972);

Jordan v. School District of City of Erie, Pennsylvania, 583 F.2d 91 (3rd Cir. 1978) (modifying and approving consent decree);
Board of Education v. Scott, C.A. No. 176-814 (Mich.Cir.Ct., Wayne County, Jan. 12, 1972) (Clearinghouse No. 7380C);
Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill. 3/31/75).

When the new school does not offer the same regular classroom program but is, rather, a continuation school or school for students with behavior problems, the impairment of protected interests warrants the same protection as for expulsions. In *Quintanilla*, a federal district court held that a formal hearing was necessary, with an impartial hearing officer who may not be an administrator from a student's school, for students facing expulsion, and went on to say,

> Although defendants have offered to place plaintiff in a G.E.D. night school program, he has been absolutely denied -- without a hearing -- the right to obtain a standard high school diploma and the right to attend Kelvyn Park. Considering the Board's transfer policy and the fundamental differences between a G.E.D. certificate and a standard diploma, this amounts to the functional equivalent of an absolute expulsion.

See: *Jordan*, *supra* (transfer, usually for limited time, to special school for disruptive students);
Taylor v. Maryland School for the Blind, 409 F.Supp. 148, 152 (D. Md. 1976) ("A forced transfer from an educational institution for the handicapped to a custodial one should be governed by the due process clause");
Chicago Board of Education v. Terrile, 47 Ill.App.3d 75, 361 N.E.2d 778 (1977) (commitment to special school for truants violated due process rights by abridging liberties of association, privacy, and movement without demonstrating that such commitment both would meet the student's need and was the least restrictive means available).

Compare:
Zamora v. Pomeroy, 639 F.2d 662, 668-70 (10th Cir. 1981) (court relied on similarity of educational program and absence of demonstrated academic harm in ruling that transfer for a semester did not violate the procedural due process; unclear whether court was ruling that there was no entitlement to due process procedures or that student was so entitled but that in light of the above factors, the numerous hearings he received, at which he presented no evidence to challenge or mitigate the charges of possession of marijuana, were adequate).

Cf.: *Vitek v. Jones*, 100 S.Ct. 1254, 1263-64 (1980) (right of prisoner to due process when transferred to a mental hospital for involuntary psychiatric treatment, in light of stigmatization and mandatory behavior modification program).

Even when the new school is nominally similar, there are likely to be more subtle educational differences, and possibly more burdensome travel, as well as loss of friends and teachers. See *Everett v. Marcase, supra*. Also, when a school is ready to contemplate disciplinary transfer, the stigmatizing effects may be large because of the likely seriousness of the charges of misconduct. *Id*.

Further, specific property entitlements may be found in state and local laws, policies, or practices mandating attendance at the student's regular school. For instance, a district's neighborhood school assignment plan may have created an objectively grounded expectation that when a family resides in a particular neighborhood, its children will attend a particular school. (Note too the extent to which a neighborhood's "property values" are often tied to a school's reputation.) See also 20 U.S.C. §1701(a): "The Congress declares it to be the policy of the United States that . . . (2) the neighborhood is the appropriate basis for determining public school assignments." Similarly, a property interest in attending a particular school may be created by a district policy under which students attending a school one year normally will be able to attend it the next. See *Perry v. Sindermann*, 408 U.S. 593 (1972), and the material on the creation of property interests in §IX.A. Cf. *Kraut v. Rachford*, 51 Ill.App.3d 206, 9 Ill.Dec. 240, 366 N.E.2d 497, 501, 502-503 (Ill.App. 1979), where the court held that a student who was dropped from enrollment in a high school on grounds of non-residency (thereby leaving him with the option of attending in a different district) was deprived of a property interest and was therefore entitled to procedural due process:

> [T]he term "property" is broad enough to offer protection to an objective expectancy of the continuance of an interest which has been initially conferred by the state. (*Perry v. Sindermann* (1972), 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570.) Whether such an expectancy may be characterized as a "legitimate claim of entitlement" denoting objectivity, rather than an "abstract desire or need" denoting subjectivity, depends on the statutory terms creating the interest as well as the rules or policies by which it is administered. 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561. . . .
>
> Here, it cannot be questioned that the Illinois School Code conferred upon plaintiff an interest in attending *a* school on a tuition-free basis and that the retention of such a benefit is protected by the requirements of due process of law. The question remains, however, whether this protection is to be afforded his interest in remaining in H-F [the particular school] on a tuition-free basis. He had attended H-F during the 1973-74 school year as a tuition-free student, although one of his freshman enrollment forms indicated that he may not have been a resident of its attendance district since he lived with his aunt within the district rather than with his mother who resided in an adjacent school district. . . . Under these circumstances, we believe that the actions of H-F in allowing him to attend on a tuition-free basis during his freshman year and further allowing him to proceed to final registration for his sophomore year, which encompassed a time period

> during which his living conditions remained constant, fostered an objective expectancy in his continuation at H-F on the same basis as before. (Perry; Roth.) Therefore, we hold that plaintiff was entitled to due process protection of his interest in continuing to attend H-F as a resident student.

Thus, while it is necessary to demonstrate some property or liberty interest at stake when the student is transferred to another school, the absence of a constitutional right to attend a particular school is not a bar to due process claims. First, the state-granted entitlement to education creates a property interest (see §IX.A), and at least some transfers constitute a significant reduction in that entitlement when compared with the regular programs to which students across the state or within the district are otherwise entitled. Second, the state or local system may have created, through assignment policies, etc., a specific property interest in attending a particular school. Third, even in the absence of a property interest, a transfer may deprive a student of various liberty interests, such as restriction of freedom of association, foreclosure of future occupational opportunities, damage to reputation caused by the transfer, and (for transfer to certain types of "special" schools), intrusion on personal privacy or personal and physical security. (See §IX.A. for more detail on protected liberty interests.) Cf.:

> Vitek v. Jones, supra, 100 S.Ct. at 1261-62 (liberty interest is created where, through law or official practice, prisoner is given justifiable expectation that he will not be transferred except for misbehavior or upon the occurrence of other specified events, and prisoner is thus entitled to constitutionally adequate procedures in determining that the conditions have been met).

What Kind of Procedures

In establishing the particular procedures to which a student facing transfer is entitled, it becomes important to stress the extent of the property and liberty deprivations -- particularly as compared to either a suspension of from one to ten days (which normally requires only informal notice and hearing) or a suspension of more than ten days (which entitles the student to relatively formal procedures). See § IX.B on the factors for determining "what kind of due process."

Special Education Procedures

For certain kinds of transfers, procedures mandated by federal laws protecting handicapped students may also be required -- either (1) because the student has already been classified as "handicapped" or referred for evaluation or (2) because the program, while not so called by the school system, is really functioning in disguise as a special education program (e.g., for students with "emotional problems"). See §VIII.D, "Disciplinary Transfer," in the Substantive Rights portion of the manual, for discussion.

Non-Disciplinary Transfers

A different analysis from the above is required for examining the due process claims of a student who is transferred as part of a general policy, such as integration or charges in school assignment districts, rather than for disciplinary reasons. First, if the policy is being carried out in order to meet the requirements of the Fourteenth Amendment, either under court order or voluntarily, then whatever state-granted entitlement the student might otherwise have is necessarily limited by those constitutional requirements. (There may be other judicial or administrative avenues for challenging court-ordered or voluntary assignment plans, but these remedies are quite different from a claim of a due process right to a hearing before the school board when it draws up its plan.) Second, even if the reassignment plan (as opposed to an individual placement) is not constitutionally mandated but is undertaken for general policy reasons, a due process claim would likely be defeated under the principle that individuals do not have constitutional due process rights to be heard when the state is reaching a legislative or law-making, rather than an adjudicative, decision. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). Cf. Dawson v. Troxel, 561 P.2d 694 (Wash.App. 1977) (procedural due process was satisfied where, in revoking transfers of white students as part of desegregation plan, district notified students and provided opportunity for appeal).

Nevertheless, a school cannot escape its due process obligations by relabeling a disciplinary transfer as something else. Thus, in Everett v. Marcase, supra, 426 F.Supp. at 400, the court said,

> Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment. The analogy between a transfer for the good of the pupil and a jail sentence for a convicted felon for "rehabilitation" is not entirely remote.

Similarly, in St. Ann v. Palisi, 495 F.2d 423, 427 (5th Cir. 1974), the court rejected the argument that transfer of students because their mother struck their teacher was not "punishment" and therefore did not raise due process issues.

Substantive Challenges to Transfers

See "Substantive Rights," §VIII.D, "Disciplinary Transfer."

D. IN-SCHOOL SUSPENSION

"This article has noted that some alternative programs may entail unacceptable behavior control, and that individual liberties may be infringed by programs designed to bring behavior into conformity with a preconceived norm. Where these programs take the form of separate classes, their very existence may make schools and teachers more willing to give up on a student within the regular class framework....

"Central to any alternative program should be due process determinations, and a parental/student option for exclusion rather than the proposed alternative. At least as much due process should be provided prior to 'in-school suspension' as for traditional suspension in order to avoid incorrect or arbitrary determinations of misconduct. Some of the students who were placed in the small plywood booths mentioned at the outset of this article, for example, may have been right in feeling that they did not do anything wrong. And certainly, any alternative which takes the student out of regular classes for an extended period (say, ten days or more) should be preceded by the kind of formal due process required prior to expulsion from school."

Merle McClung, "Alternatives to Disciplinary Exclusion from School," 20 Inequality in Education 58, 68 (July 1975).

Similar procedures are called for by Hayes Mizell, "Designing and Implementing Effective In-school Alternatives to Suspension," 10 Urban Review (3) 213, 218-19 (1978). Mizell also recommends other screening procedures and review procedures to avoid overuse of in-school suspension.

"In-school suspension" can become a vehicle for evading basic due process safeguards. Thus, it is important to argue for a definition of "suspension" as exclusion from the student's regular program, so that an "in-school suspension" is regarded as a form of suspension, rather than an alternative to suspension. In other words, a decision should first be made that a student's conduct warrants his/her suspension from his/her regular program. Only after that decision has been made should the student then be offered an in-school suspension as an alternative to total exclusion. (See "Substantive Rights," §VIII.E, "In-School Suspension," concerning consent requirements under which the student/parent is free to reject in-school suspension and choose full suspension instead.)

The court in Mills v. Board of Education, 348 F.Supp. 866, 880 (D.D.C. 1972) ordered disciplinary hearing procedures which would seem to apply to in-school suspensions: "suspension, expulsion, postponement, inter-school transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days." Moreover, the court required that any student so excluded must be provided with "adequate alternative educational services suited to the child's needs" (id. at 878, 882), and that pending the hearing and notice of the decision "there shall be no change in the educational placement of the child," unless there is a determination of ongoing threat to physical well-being of persons. in which case the student must receive "some form of educational assistance and/or diagnostic examination during the interim period" (883).

The existence of property or liberty interests affected by in-school suspension -- and the extent of the deprivation -- will largely depend upon three factors:

- the length of the suspension;
- the degree to which the program is similar, at one end, to the student's normal educational program or, at the other end, to an exclusion from any meaningful educational program;
- the degree to which the nature of the program involves deprivation of other liberty interests, through greater physical constraint or confinement, intrusions on personal privacy, curtailing of association with other students, damage to reputation, etc.

To the degree that the in-school suspension should be treated as any other short suspension, see §X.A. for applicable procedures. To the degree that procedures applicable to long-term suspension should apply, see § X.B. In assessing additional deprivations of liberty interests which are not present when the student is simply excluded from school, see §X.C., "Disciplinary Transfer." On property and liberty interests generally, see §IX.A. On determining the applicable form of due process generally, see §IX.B.

See "Substantive Rights," §VIII.E, "In-School Suspension," for discussion of substantive challenges to in-school suspensions, including such issues as:

- substantive challenges applicable to any suspension;
- in-school programs which deprive students of fundamental liberties;
- holding-pen programs which compel attendance without minimally adequate education;
- requiring consent by student and parent before placement;
- racial segregation;
- procedures for students classified as handicapped or referred for evaluations;
- special education programs in disguise.

For policy materials, see also §XIII.B, "Alternatives."

For related issues, see §X.E, "Removal From P[illegible]cular Classes."

E. REMOVAL FROM PARTICULAR CLASSES

Removal from particular classes can range from loss of a single class period to exclusion from a course altogether, and the procedural approach will very accordingly. Loss of a single class period, or loss of anything less than the equivalent of a full day of school, might be regarded as "de minimus," and thus subject to no due process requirements. (See §IX.A). This might not be the case, however, if the student is sent even for a single period to a program which seriously intrudes on other liberty interests, such as bodily restraint or intrusions into privacy. (Id.)

Where the removals from class accumulate to the point that the student is excluded for the equivalent of one full day or more, an analysis similar to that for short in-school suspensions is probably appropriate. (See §X.D.).

A student who is removed from an entire course altogether may have rights more analogous to those for disciplinary transfer. (See §X.C.). The existence and extent of due process rights would turn in part on the degree to which the options left to the student were significantly reduced.

In Arundar v. DeKalb County School District, 620 F.2d. 493 (5th Cir. 1980), a student allegedly was denied the right to enroll in certain courses of study, thereby blocking future access to higher education in a highly technical field. The court held that the plaintiff had not established a property interest because she had simply failed to allege "any 'independent source such as state statutes or [other] rules' entitling the plaintiff to the particular course of study which she claims has been denied her." (Id. at 494.) The decision should not, however, bar due process claims for disciplinary exclusions from courses. First, the student here was not excluded from courses in which she was enrolled, but was only refused admission to new classes (just as a teacher can have a property interest in his/her existing job, but generally not in a job for which s/he has only applied; and as an enrolled university student is entitled to a hearing before being excluded for disciplinary reasons, but an applicant generally has no hearing rights concerning rejection of his/her application). It may be possible to show, as was not done here, that the school has created, through its policies and practices, a legitimate expectation of continued enrollment in particular courses. Further, the court here did not address the possible existence of liberty interests, including the interest in protection against government action which forecloses future employment opportunities. (See §IX.A.)

There are also significant differences between disciplinary and academic decisions. Finally, note that the court held that the student's complaint should be dismissed without prejudice, permitting her to file a new cause of action.

At the other end, the court in Jordan v. School District of City of Erie, Pa., 581 F.2d 91 (3rd Cir. 1978), held that no student should be removed from class until after Goss-type informal notice and hearing procedures were provided by the principal, unless the teacher and the principal agree that the student's presence poses an ongoing danger of harm to persons or property or ongoing threat of disruption, in which case the student may be removed immediately, with the hearing to follow within three days.

F. EXCLUSION FROM EXTRACURRICULAR ACTIVITIES

"Extracurricular activities are a settled part of school life. They often override the regular curriculum in maintaining student interest in school and are a vital element in the over-all educational program. As a result, educators should carefully consider extracurricular programs and be aware of the legal issues involved. Although there is divided opinion over the legal relation of extracurricular activities to the total school program, expulsions from activities are grievous losses to students, psychologically and legally."

Edward L. Winn, III, "Legal Control of Student Extracurricular Activities," 7 School Law Bulletin (No. 3) 1, 10 (July 1976).

Once again, the key to due process analysis is in first establishing property or liberty interests under §IX.A, and then applying the factors in §IX.B for determining what process is due. Several courts have held that exclusion from extracurricular activities deprives students of property or liberty interests, thereby entitling the students to due process.

Kelley v. Metropolitan County Board of Education, 293 F.Supp. 485 491-92 (M.D.Tenn. 1968) (high school athletics);

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602 (D.Minn. 1972) (suspension for remainder of basketball season requires extensive notice and hearing procedures);

Warren v. National Association or Secondary School Principals, 375 F.Supp. 1043 (W.D.Tex. 1974) (student excluded from National Honor Society entitled to adequate notice and fair hearing of at least a somewhat more formal nature than that for short suspensions, before a truly impartial panel);

DePrima v. Columbia-Green Community College, 392 N.Y.S.2d 348 (N.Y.Sup.Ct., Albany County, 1977) (student placed on disciplinary probation, thereby depriving him of participation in student activities, was denied due process where he was not allowed to confront and cross-examine opposing witnesses and call his own witnesses);

Ector County Independent School District v. Hopkins, 518 S.W.2d 576 (Tex.Civ.App. 1974) (holding similar to Warren concerning exclusion from honor society; denial of due process also because of exclusion from another organization designed to foster school spirit).

See: Davis v. Central Dauphin School District School Board, 466 F.Supp. 1259 (M.D.Pa. 1979) (because athletic policies imply that student could participate in high school athletics unless at the very least the policies were violated, the student arguably had a property interest in participation; but adequate procedures were provided in this case);

ABC League v. Missouri State High School Activities Ass'n, 530 F. Supp. 1033, 1044, 1047 (E.D.Mo. 1981) (Student's "interest in participating in interscholastic sports is substantial and significant;" repeal of exemption from transfer rule was arbitrary and capricious);

Pelley v. Fraser, C.A. No. B-76-C-14 (E.D.Ark., May 18, 1976) (Clearinghouse No. 19,518A) (where high school student was removed from student council president position for completing English assignment in language which teacher found crude, "there is a serious due process question presented");

Braesch v. DePasquale, 265 N.W.2d 842, 845 (Neb. 1978) ("A student's interest in participation in high school athletics is nevertheless a significant one;" adequate process provided in this case);

French v. Cornwall, 276 N.W.2d 216, 218 (Neb. 1979) (similar statement).

Cf.: Brenden v. Independent School District, 477 F.2d 1292, 1297-99 (8th Cir. 1973) (sex discrimination equal protection case; court discusses extracurricular activities as integral part of education);

Chabert v. Louisiana High School Athletic Association, 323 So.2d 774, 777 (La. 1975) (where student challenged athletic transfer rule, court rejected the contention that, because participation is a privilege not a right, there is no constitutional issue; court found a rational relationship in this case, and thus no denial of equal protection).

In contrast, some cases have rejected challenges to interscholastic eligibility rules on the grounds that the student did not have a protected interest in participation in interscholastic athletics (although those which deal with post-secondary schools may be distinguishable).

Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975);

Albach v. Odle, 531 F.2d 983 (10th Cir. 1976);

Hamilton v. Tennessee Secondary School Athletic Association, 552 F.2d 681 (6th Cir. 1976);

Colorado Seminary (University of Denver) v. N.C.A.A., 570 F.2d 320 (10th Cir. 1978);

Walsh v. Louisiana High School Athletic Association, 616 F.2d 152, 159 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1981);

Hebert v. Ventetuolo, 638 F.2d 5 (1st Cir. 1981);

Dallam v. Cumberland Valley School District, 391 F.Supp. 358 (M.D.Pa. 1975);

Kulovitz v. Illinois High School Association, 462 F.Supp. 875 (N.D.Ill. 1978);

Williams v. Hamilton, 497 F.Supp. 641, 645 (D.N.H. 1980);

Smith v. Crim, 240 Ga. 390, 240 S.E.2d 884 (Ga. 1977);

N.C.A.A. V. Gillard, 352 So.2d 1072 (Miss. 1972);

Sullivan v. University Interscholastic League, 599 S.W.2d 860, 863 (Tex.Civ.App. 1980).

Cf.: *Pegram v. Nelson*, 469 F.Supp. 1134 (M.D.N.C. 1979) (student excluded from after-school activities for remainder of year for stealing wallet received adequate due process, assuming there was a protected interest at stake; court indicated, without deciding the issue, that there was no property interest at stake, but stated that "*total exclusion* from participation in that part of the educational process designated as extracurricular activities for a *lengthy period of time* could, depending upon the particular circumstances, be a sufficient deprivation to implicate due process" [1140, emphasis in original]);

Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352-53 (9th Cir. 1981) (college student had no protected interest in maintaining a particular position on the football team; note that this is quite a different claim then claims concerning disciplinary exclusions from activities for which students are otherwise eligible);

Fluitt v. University of Nebraska, 489 F.Supp. 1194, 1202-03 (D.Neb. 1980) (court notes that factors leading to establishment of protected interest in high school athletic participation may not be applicable concerning intercollegiate participation).

Some cases have held that students received adequate notice and hearing, without necessarily deciding whether there were property or liberty interests at stake in the first place.

Regents of University of Minnesota v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977);

Pegram, *supra*;

Fluitt, *supra*;

Buhlman v. Board of Education, 436 N.Y.S.2d 192 (Sup.Ct., Rockland County, 1981).

McNaughton v. Circleville Board of Education, 345 N.E.2d 649, 656 (Ohio Common Pleas, 1974) (*Goss*-type informal hearing for 40-day suspension from athletic activities sufficient where students admitted charges; court stated that more may have been required if students had denied charges).

The cases holding that there is no protected interest seem wrongly decided and, in any event, are distinguishable from cases involving exclusion for misconduct. Most of these eligibility cases have been based on the notion that the property interest in education, which the Supreme Court recognized in *Goss v. Lopez*, 419 U.S. 565 (1975), cannot be broken down into separate components. *Dallam v. Cumberland Valley School District*, *supra*, 391 F.Supp. at 361, is typical of these cases:

> It is significant that in the context of finding a property interest in education the majority in Goss spoke in terms of a "total exclusion from the educational process." ___U.S. at ___ 95 S.Ct. at 737. It seems to us that the property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution.

This appears to be a serious misreading of Goss. First, it is difficult to see how suspension for one day is any more a total exclusion from the educational process (which the Court in Goss never sets forth as the standard anyway) than a year-long exclusion from a portion of the educational program. [See 419 U.S. at 597 (J. Powell, dissenting).]

Second, the initial determination of a right to due process depends on the existence of some protected interest which may be impaired by government action, and not on the extent of the loss. 419 U.S. at 575-76. Thus, the property interest in education is at stake as long as extracurricular activities are seen as an integral part of the educational process, a proposition which has been established by cases concerning student fees, e.g.:

Pachecho v. School District No. 11, No. 25912 (Colorado Supreme Court, Dec. 3, 1973);
Bond v. Public Schools of Ann Arbor School District, 178 N.W.2d 484, 488, 383 Mich. 693 (1970);
cf. Granger v. Cascade County School District, 499 P.2d 780, 786 (Mont. 1973);

cases concerning the rights of students who are married, pregnant, or parents to participate in extracurricular activities, e.g.:

Davis v. Meek, 344 F.Supp. 298 (N.D.Ohio 1972);
Moran v. School District No. 7, Yellowstone County, 350 F.Supp. 1180 (D.Mont. 1972);
Holt v. Shelton, 341 F.Supp. 821 (M.D.Tenn. 1972);
Johnson v. Board of Education of the Borough of Paulsboro, C.A. No. 172-70 (D.N.J., Apr. 14, 1970) (Clearinghouse No. 3018);
Other cases cited in "Substantive Rights," §VII.C, "Marriage, Parenthood, and Pregnancy;"

cases and comments generally in the substantive rights section on extracurricular activities, §VIII.F.

See also:
Board of Education of the City of Asbury Park v. Asbury Park Education Ass'n, 145 N.J. 495, 368 A.2d 396, 401-02 (N.J. Super.Ct. 1976) (enjoining teachers from refusing to perform extracurricular activities; "realistically, the term extracurricular activity is a misnomer; it is not an 'extra' in the life of a student, nor has it traditionally been considered an 'extra' for teachers. Such activities are an essential part of a child's overall education. Learning and self-realization cannot take place in a vacuum; rather, they are fostered in an atmosphere of social interaction and furthered by the development of a healthy group orientation").

Third, and more generally, the existence of a property right is determined by looking to the statutes, regulations, policies, and standard practices of the state and its agencies (including local school districts), which can create an objective expectation of entitlement. These sources should provide help in deciding whether or not a property interest in specific components of the education program has been created. (See §IX.A on property interests.) It was on this basis that the court in Davis, supra, distinguished the earlier decision in the same district in Dallam, supra:

> Russell Davis was suspended pursuant to ¶2(d) of the Central Dauphin School District's Athletic Association Policies which reads "Conduct unbecoming an athlete as determined by the coach and principal." In addition to ¶2(d), the Central Dauphin School District's Athletic Association Policies set forth other conduct which would result in suspension from interscholastic sports for twelve months e.g. use of intoxicating beverages, quitting, deliberate destruction of or stealing school property. The athletic policies also allow suspension for a season for violation of specific rules set up by the coach or by school policy. The School District's Athletic Association Policies imply that an athlete may participate in interscholastic athletics unless he violates some provisions of the policies. The Court is of the view that Davis had a reasonable expectation under the athletic policies that he would be permitted to participate in high school athletics unless he violated the provisions of the athletic policies. At the very least, then, it is arguable that Davis had a property interest in participating in high school athletics which was created and defined by an independent source, the Central Dauphin School District's Athletic Association Policies.
>
> Defendants contend that Davis has no property interest in playing interscholastic basketball. In support of their proposition, Defendants stress two cases in this Circuit, Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121 (3rd Cir. 1978) and Dallam v. Cumberland County School District, 391 F.Supp. 358 (M.D.Pa. 1975). However, in Moreland, the claim of a federally protected right to play basketball was not raised on appeal and the question has not been decided by the Court of Appeals. In Dallam, the Court did not have before it a policy of the School District which implicitly noted the right to participate in interscholastic athletics. The Court concludes that the cases are distinguishable.

Liberty interests may also be involved in extracurricular participation, depending upon the particular activity:

- -- freedom of association (see "Substantive Rights," §I.B.6, "Association -- Student Organizations"):
- -- imposition of a stigma or other disability which forecloses future employment opportunities (this is a liberty interest distinct from the property interest above);
- -- damage to one's good name, reputation, honor or integrity as a result of the exclusion.

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See §IX.A for fuller description of possible liberty interests. From this perspective, the athletic eligibility cases are also distinguishable. First, since they all involve rules concerning residency, transfers, off-season play, etc., they are much less likely to involve the same damage to reputation as an exclusion for misbehavior. Second, the strength of the claims concerning freedom of association are probably weaker concerning interscholastic athletic participation than for many other student organizations. (As to the liberty interest regarding foreclosure of employment opportunities, the athletic eligibility cases have generally not addressed claims of liberty interests at all, speaking instead to property interest claims alone).

In Ector County Independent School District, supra, the court specifically stated that the extracurricular exclusion from honorary societies deserved more due process protection than a short suspension, in light of the reputational damage:

> We conclude that the one-day suspension required no more than the oral notice from the Assistant Principal concerning the alleged improper conduct upon the part of the student and his determination at an informal hearing that she had in fact violated school rules. We perceive the permanent expulsion from the two school organizations [the National Honor Society and a local student group organized to foster school spirit], in which membership apparently resulted from several years of diligent efforts upon the part of Karen, both in and out of the classroom, to be of a more serious nature in which due process was initially denied. [id. at 582, emphasis added]

The court also noted that even where there is no factual dispute as to the misconduct, due process may be necessary so that the student may be heard on the issue of what discipline is appropriate (id. at 581). As indicated by both Ector County and Warren, supra, the nature of the hearing required varies with the situation, and exclusion from one event may call for different procedures than lengthier restrictions.

Some very brief extracurricular exclusions may be held so trivial as to be "de minimus." §IX.A. [See Fenton v. Stear, 423 F.Supp.767, 772 (W.D.Pa. 1976) (missing a single, one-day sight-seeing trip is no more than "de minimus").] Nevertheless, the integral nature of extracurricular activities (see above) should also help in getting past the "de minimus" hurdle, as should evidence in particular cases about, for instance, the possible loss of athletic scholarship or the psychological harms which may flow from being excluded from an activity that is really important to a student, particularly as compared with one-day suspensions.

For substantive challenges to extracurricular exclusion, see §VIII.F. in the substantive rights portion of the manual.

G. EXCLUSION FROM GRADUATION CEREMONIES

§VIII.G of the substantive rights portion of the manual provides cases and comments on substantive challenges to exclusion from graduation ceremonies.

The student's right to notice and hearing prior to any such exclusion will depend upon a showing that one or more of the property or liberty interests discussed in §IX.A is at stake and that the interest is not so trivial as to be "de minimis." The form of any notice and hearing should depend upon the factors discussed in §IX.B.

The issue here is not whether the student has a protected interest in his/her diploma, but whether s/he has a protected interest in participation in the ceremony itself. (Concerning the former, see §X.H, "Procedural Rights for Grading, Diploma Denial, and Other 'Academic' Decisions.")

The argument is that the local school system has, through its policies and practices, established an objective expectation that students meeting the requirements for graduation will be allowed to participate in the ceremony, and that this entitlement is more than trivial. It may be helpful to compare the importance of the ceremony with the importance of one day of school, which under Goss v. Lopez, 419 U.S. 565 (1975), is more than "de minimus." See:

Clark v. Board of Education, 51 Ohio Misc. 71, 367 N.E.2d 69, 74 (Ohio Common Pleas, 1977) (Fourteenth Amendment, including equal protection and personal privileges, protects rights of senior activities, including graduation ceremonies);

Castillo v. South Conejos School District, RE-10, C.A. No. 79-CV-16 (Colo.Dist.Ct., Conejos County, 4/18/79) (same).

But see:

Fowler v. Williamson, 448 F.Supp. 497 (W.D.N.C. 1978) (no liberty or property interests in participation in graduation ceremonies, although court recognizes property interest in the diploma itself).

H. PROCEDURAL RIGHTS FOR GRADING, DIPLOMA DENIAL, AND OTHER "ACADEMIC" DECISIONS

In Board of Curators v. Horowitz, 98 S.Ct. 948 (1978), a student who was dismissed from medical school alleged a denial of due process. She did not allege deprivation of a property interest, and the Court held that it need not decide on her claim of a liberty interest (based on foreclosed opportunities to continue in medicine) since the Court declared, 98 S.Ct. at 952:

> Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The School fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment. We agree with the District Court that respondent
>
> > "was afforded full procedural due process by the [school]. In fact, the court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct."

The Court went on to state that notice and hearing requirements for disciplinary actions are generally not appropriate for dismissals "for pure academic reasons" (98 S.Ct. at 955 n.6) because an academic judgment "is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision," and because courts are generally ill-equipped to review academic judgments. (Id. at 955).

Several post-Horowitz decisions have held that particular procedures used in making academic decisions were sufficient to meet whatever due process requirements may be applicable. See, e.g.:

Miller v. Hamline University School of Law, 601 F.2d 970 (8th Cir. 1979);
Hubbard v. John Tyler Community College, 455 F.Supp. 753 (E.D.Va. 1978);
Watson v. University of South Alabama College of Medicine, 463 F.Supp. 720 (S.D.Ala. 1979);

Valadez v. Graham, 474 F.Supp. 149 (M.D.Fla. 1979);
Bleicker v. Board of Trustees, 485 F.Supp. 1381 (S.D.Ohio 1980).

Compare:
Debra P. v. Turlington, *infra*.

While purely academic decisions thus no longer require disciplinary-type notice and hearing, lower court decisions and standard due process analysis nevertheless make it reasonably clear that many purely academic decisions do involve significant due process interests which must be protected by other appropriate procedures. First, the student's property entitlement to education is as affected by an academic dismissal (or diploma denial) as by a disciplinary dismissal. Many lower courts have found property interests, and nothing in *Horowitz* undermines their holdings on that point. See, e.g.:

Navato v. Sletten, 560 F.2d 340, 343 (8th Cir. 1977);

Ross v. Pennsylvania State University, 445 F.Supp. 147, 152 (M.D.Pa. 1978) ("A student has a reasonable expectation based on statements of policy by Penn State and the experience of former students that if he performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks. Pursuant to state law, Ross as a graduate student had a property interest in the continuation of his course of study");

Debra P. v. Turlington, 474 F.Supp. 244, 265-67 (M.D.Fla. 1979), *aff'd in relevant part*, 644 F.2d 397, 403-06 (5th Cir. 1981) (denial of high school diploma because of failure on "functional literacy test" which was instituted only after students had reached high school level implicated students' "property right in graduation with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the [test]" as well as their "liberty interest in being free of the adverse stigma associated with the certificate of completion" (given to students who had completed all courses but did not pass the test); the implementation schedule for the test denied due process because it provided inadequate notice, particularly since the skills which were measured should have been taught in the early grades; *Horowitz* distinguished in light of the extended notice and review procedures used in the latter case, as well as the differences between graduate education and secondary education; the appeals court's formulation was that the state's establishment of free, compulsory education created a mutual expectation, rising to the level of a property interest, that a student who attends and passes the required courses will receive a diploma; appeals court remanded because it also found a fundamental unfairness in the test's covering matters that may not have been taught);

North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977) (dismissal from medical school and loss of all credits).

Cf: *Horowitz*, *supra*, 98 S.Ct. at 953 n.3 ("We fully recognize that the deprivation to which respondent was subjected -- dismissal from a graduate medical school -- was more severe than the 10-day suspension to which the high school students were subject in *Goss*");

Arundar v. DeKalb County School District, 620 F.2d 493, 494 (5th Cir. 1980) (plaintiff's complaint failed to allege "any 'independent source, such as state statutes or [other] rules' entitling plaintiff to the particular course of study which she claims has been denied her");

Cases in "Substantive Rights," §VIII.C.4, "Purely Academic Decisions" -- the many academic dismissal cases which, by stating that courts may intervene where the dismissal is arbitrary and capricious, are implicitly declaring that due process interests are at stake, since the federal courts would have no jurisdiction under a substantive due process "arbitrary and capricious" standard in the absence of protected interests.

See §IX.A for analysis of relevant property and liberty interests.

Further, the Court in Horowitz distinguished Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), where the court of appeals held that a student who was dismissed from medical school was entitled to a hearing because, even though the dismissal was solely for academic reasons, the school's sending of a letter to a medical college association suggesting the student's alleged deficiency in intellectual ability produced a need for greater procedural protections. 98 S.Ct. at 954 n.5.

In any event, the limits placed on procedural protection for purely academic decisions do not apply when academic credit is being denied for what are really disciplinary reasons. (See cases cited at §VIII.C.4, "Purely Academic Decisions - - The 'Academic'/'Disciplinary' Distinction.") Aside from more subtle forms of reducing grades for student's non-academic conduct (see §VIII.C.3), the most common practice in this area is the reduction of grades or credits for absences or tardiness (see §VIII.C.1). As the latter section explains, this practice is clearly "disciplinary" and is subject to a number of substantive challenges. Similarly, it should call for procedural protection appropriate to the nature of the case. (See §IX.B, "What Kind of Due Process.") Moreover, where a short suspension results in additional punishment -- through grade reductions for "unexcused" absence during the suspension days or through denial of the right to make up tests missed -- the student is arguably entitled to a considerably more formal hearing than applies to the normal short suspension. (See §IX.B and §VIII.C.1.) Jones v. Latexo Independent School District, 499 F.Supp. 223, 239 n.15 (E.D.Tex. 1980). See Shanley v. Northeast Independent School District, 462 F.Supp. 960, 967 n.4 (5th Cir. 1972).

For related cases, see §V.E, "School's Failure to Follow Its Own Rules;" and §VI.E, "Contract." Many of the cases cited in both sections relate to dismissals for "academic"/"disciplinary" reasons, and the legal concepts discussed provide additional handles.

J. CORPORAL PUNISHMENT

The Supreme Court has held that corporal punishment does deprive students of liberty interests, but then declared that the required procedural due process does not include notice and hearing. *Ingraham v. Wright*, 430 U.S. 651 (1977). The Court recognized that the Due Process Clause does protect the liberty interest in freedom from physical restraint and infliction of physical pain. The Court declared, however, that sufficient procedural protection is provided by students' right to sue for damages and/or press criminal charges for assault and battery in state court if the punishment is excessive under state law. The "reasoning" of this decision has been criticized elsewhere. See, e.g.:

Thomas J. Flygare, "Ingraham v. Wright: The Return of Old Jack Seaver," 23 *Inequality in Education* 29 (September 1978);

Pat M. Lines, "Corporal Punishment After Ingraham: Looking to State Law," 23 *Inequality in Education* 37 (September 1978).

For substantive challenges, see "Substantive Rights," §VIII.B, "Corporal Punishment and Similar Abuses."

K. EXCLUSION FROM SCHOOL BUS

Students facing exclusion from the school bus for disciplinary reasons may be entitled to appropriate due process procedures under either of two theories. First, if the student effectively has no other means of attending school, the exclusion deprives him/her of the property interest in attending, much as a full suspension or expulsion. Shaffer v. Board of School Directors, 522 F.Supp. 1138, 1142 (W.D.Pa. 1981) (on appeal). Cf. Shrewsbury v. Board of Education, 265 S.E.2d 767 (W.Va. 1980) (equal protection case).

Second, state statutes which mandate the provision of bus transportation for students who live beyond a certain distance may create a separate property interest in the bus transportation itself. Rose v. Nashua Board of Education, 506 F.Supp. 1366 (D.N.H. 1981) (on appeal). Cf. Shrewsbury, supra. In Rose, the court found that the state bus statute created a property interest, but held that the administrative appeals procedure provided there for bus suspension of up to five days provided adequate due process because the emergency nature of the situation (safety dangers created by throwing of burning papers, breaking window of passing car, and vandalism) justified suspension of bus transportation prior to any hearing.

For substantive challenges to the appropriateness of the penalty, see §VIII.L.

XI. SPECIFIC ELEMENTS OF DUE PROCESS

The sections below discuss particular procedural safeguards which have been held to be required in a variety of disciplinary contexts. It is important to read these sections in conjunction with §X on the specific kind of discipline at issue and the more general principles in §IX.B for determining what process is due.

Note on Case Citations and Form of Discipline

As §IX.B indicates, an important factor in determining "what kind of due process" is the severity of the deprivation -- including, for exclusions, the length of the exclusion. Each case cited throughout §XI includes a notation as to the kinds of discipline, including their length, to which the court applied the specific procedural requirement. The extent to which these procedures are applicable to short-term exclusions is addressed within each section and in §X.A, "Suspension for Ten Days or Less."

Individual Harm, General Review

In individual cases, courts will sometimes emphasize the general rule that the constitutional adequacy of due process must be judged in light of the particular circumstances, including the kinds of procedures needed to minimize mistakes (see §IX.B). It thus can be very important to demonstrate how the particular student's interests in a fair and accurate determination were hampered by the absence of the particular procedures at issue, in order to avoid a finding that any error was harmless.

On the other hand, when a school's due process procedures are under review in a more general context (e.g., in a class action or in a legal and policy review outside the context of litigation), the focus is more properly on whether the school's uniform procedures for certain kinds of discipline are/will be adequate for the full range of circumstances and cases arising under those procedures. Even here, however, concrete evidence of problems will be helpful.

State Law

Many states have enacted statutes which set out disciplinary procedures. These sometimes provide legally binding procedural rights which go beyond the constitutional minimums discussed below. On the other hand, students cannot be deprived of their constitutional rights if the state statutes fail to set forth full constitutional rights.

Local Rules

Similarly, locally enacted rules may provide procedural rights which go beyond constitutional minimums, and these rules may also be legally binding, as discussed in §V.E, "School's failure to Follow Its Own Rules."

A. PRIOR HEARINGS AND THE EMERGENCY EXCEPTION

Overview

Normally, notice and hearing must be provided before the student is suspended, expelled, etc. An exception is permitted where there is a genuine emergency in which the student's continued presence poses an on-going physical danger or an on-going threat of disruption of the academic process. In such emergencies, notice and hearing must follow as soon as practicable, and in no event later then three days after the exclusion begins. The fact that there is justification for removing the student from the school by itself does not dispense with the requirement of prior notice and hearing -- unless the threat also makes it impossible to provide such notice and hearing. Where full hearings are impossible and must be delayed, less extensive interim hearings must be provided -- before the exclusion if possible, as soon thereafter if not. A very narrow reading of the emergency exception is called for, given the tendency of some districts to label virtually any suspension an "emergency."

General Right to Prior Hearing

"[I]t is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."

Bell v. Burson, 402 U.S. 535, 542 (1971) (emphasis in original), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Accord:

Boddie v. Connecticut, 401 U.S. 371, 379 (1971);
Board of Regents v. Roth, 408 U.S. 564, 570 (1972);
Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974);
Goss v. Lopez, 419 U.S. 565, 581-82 (1975);
Mathews v. Eldridge, 424 U.S. 319, 333 (1976);
Smith v. Organization of Foster Families, 97 S.Ct. 2094, 2111-12 (1977);
Memphis Light, Gas & Water Division v. Craft, 98 S.Ct. 1554, 1563 (1978).

In Goss, supra, the Supreme Court applied this rule to suspensions for ten days or less, requiring prior notice and hearing unless the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." In such emergency conditions, the student "may be immediately removed from school," with notice and hearing to "follow as soon as practicable," and in no event later than three days after the suspension begins.

Subsequent decisions have applied this standard for prior hearings in school discipline cases:

Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (suspensions of twelve days or less);

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 96-97, (3rd Cir. 1978) (student removal from a class);

Everett v. Marcase, 426 F.Supp. 397, 403 (E.D.Pa. 1977) (disciplinary transfer);

Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill. 3/31/75) (permanent expulsion);

Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D.Mich. 12/29/78) (one-day suspension);

Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D.Tenn. 5/3/79) (Clearinghouse No. 26,964H) (suspension pending school board appeals).

Cf.: Mrs. A.J. v. Special School District No. 1, 478 F.Supp. 418, 426 n.7 (D.Minn. 1979) (cumulative five-day suspensions);

Montoya v. Sanger Unified School District, 502 F.Supp. 209, 212-13 (E.D.Cal. 1980) (where students were first suspended for five days following informal hearings, subsequent extension of suspensions until school board expulsion proceedings must be treated as separate, additional suspensions requiring separate hearings);

Mitchell v. Board of Trustees, 625 F.2d 660, 662 n.4 (5th Cir. 1980) (where student is provided with preliminary, prior hearing with adequate procedures for suspension pending full expulsion hearing, the suspension need not meet the emergency standard).

Compare:

Marcum v. Dahl, 658 F.2d 731, 735 (10th Cir. 1981) (students were not prejudiced by the lack of a hearing prior to nonrenewal of their basketball scholarships, since the hearing was provided prior to the effective date of the new scholarships).

For pre-Goss lower court decisions concerning the right to a prior hearing, see Center for Law and Education, The Constitutional Rights of Students, 234 (1976). See also "Some Form of Notice and Hearing" in §IX.B.

Criteria for Emergency Suspension

The exception is designed to permit the school to take flexible, immediate action where it is actually necessary in order to stop or prevent immediate physical danger or extreme disruption, but it should be read narrowly. See:

Stricklin v. Regents, 297 F.Supp. 416 (W.D.Wis. 1969), appeal dismissed as moot, 420 F.2d 1257 (7th Cir. 1970) (violence and strong indication that it would be repeated);

Buck v. Carter, 308 F.Supp. 1246 (W.D.Wis. 1970) (armed attack and firing of gun);

Gardenhire v. Chalmers, 326 F.Supp. 1200 (D.Kan. 1971) (presence of firearm in connection with events leading to criminal charge of attempted murder).

Cf.: *Rose v. Nashua Board of Education*, 506 F.Supp. 1366 (D.N.H. 1981) (on appeal) (safety dangers created by throwing burning papers, breaking window of passing car with snowball, and vandalism justified temporary suspension of bus routes prior to hearing).

Compare:

Fielder v. Board of Education, 346 F.Supp. 722, 729-30 (D.Neb. 1972) (conditions for emergency suspension not met);

Marin v. University of Puerto Rico, 377 F.Supp. 613, 623-24 (D.P.R. 1974) (same).

In *Perez v. Rodriguez Bou*, *supra*, the court held that students should be awarded damages for suspensions without hearings, since the university chancellor "did not receive any information which would indicate that plaintiffs posed a threat to property, persons, or the orderly carrying out of academic and administrative affairs" -- despite their participation in a march in which unidentified students banged on the doors and windows of his office, since this was the only brief period of disruption that day and it was later determined that plaintiffs had not participated in any disruptive behavior.

Similarly, in *Henderson v. Van Buren Public Schools Superintendent*, *supra*, the court upheld a $100 damage award for a one-day suspension without hearing (Slip Op. at 1-2):

> [S]tudents have certain rights to notice and hearing before they are suspended from school.
>
> These rights may be abridged only if there is overwhelming need on the part of school officials, for example, in the midst of great unrest in the school. School officials are charged with knowledge of this right. Further, in the instant case, the school in its student handbook guaranteed students the right to a hearing before suspension. The suspension in the instant case followed a student demonstration and unrest in the school. However, the plaintiff was not suspended on the day of the demonstration. It was not until the following morning that defendant Florido sent a notice of suspension to the plaintiff's mother, without according plaintiff notice or the right to a prior hearing. The jury was entitled to find that at the time the notice was sent the turmoil in the school had passed and with it the need to suspend prior to a hearing.

Narrow readings such as those above are needed because the danger is that the suspension without the regular suspension hearing creates the possibility of mistaken judgment which cannot be completely corrected after the fact. [See *Bradley v. Milliken*, C.A. No. 35257 (E.D.Mich., July 3, 1975), in which the court found that the Detroit school system had abused "temporary exclusions" before hearings by not limiting them to conduct which "constitutes a serious threat . . . ."] The flexible nature of the *Goss* criteria for taking emergency action leaves them open to different interpretations and to abuse.

The exception is clearly meant to apply only when taking such action prior to a regular suspension hearing is in fact *necessary* -- and *not* to situations where disruptive or violent conduct has occurred but is not an immediate continuing threat (e.g., a fight that is obviously over), nor to situations which can be handled without removing the student from school, nor to situations in which removal may be necessary but it is still possible to provide at least a rudimentary informal hearing before ejecting the student. (See below.)

One possible source of help in demanding that a school spell out narrower standards for emergency suspension is the First Amendment requirement, recognized by many courts, to define "substantial and material disruption" when applicable to expressive activities. See §I.A.2, "Restrictions on Time, Place, Manner -- The Disruption Standard."

It can also be questioned whether "disruption" generally necessitates emergency suspension at all. Particularly where the disruption is confined to a single class, it should often be possible to eliminate the ongoing nature of the disruption through some other means, such as temporarily removing the student from that class that day and giving him/her a chance to cool down, talk, etc. The standard for emergency suspension in Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972) (suspension for more than two days), is based only on physical danger to persons, and not disruption or danger to property.

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the Superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. In such exceptional cases, the principal shall be responsible for insuring that the child receives some form of educational assistance and/or diagnostic examination during the interim period prior to the hearing.

(For further discussion of alternative education during the time a student is suspended from his/her regular program, see §XIII.B.3, "Right to Education for Excluded Students.")

Preliminary or Interim Hearing

As discussed above, in Goss v. Lopez, the Supreme Court held that the suspension hearing, which must normally precede the suspension, must occur as soon as practicable (and no later than three days) after the suspension where an emergency situation justifies a delay in the normal procedures.

Beyond this obligation to hold the regular hearing as soon as practicable following the start of an emergency suspension, there is support for requiring that, even where the emergency makes this delay of the regular full hearing necessary, any less extensive due process or factfinding which can reasonably be provided prior to the suspension must be, in order to minimize mistakes. In Stricklin v. Regents of University of Wisconsin, supra, 297 F.Supp. at 420, Judge Doyle stated:

> When the appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on the campus pending a decision following a full hearing, an interim suspension may be imposed. But the question persists whether such an interim suspension may be imposed without a prior "preliminary hearing" of any kind. The constitutional answer is inescapable. An interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process requires that he be provided such a preliminary hearing at the earliest practical time. In the absence of such a requirement, a student may be suspended in an *ex parte* proceeding, for as much as 13 and probably about 18 days (as in the present cases), without any opportunity, however brief and however limited, to persuade the suspending authority that there is a case of mistaken identify or that there was extreme provocation or that there is some other compelling justification for withholding or terminating the interim suspension.

Accord, *Marin v. University of Puerto Rico*, *supra*.

In *Buck v. Carter*, *supra*, 308 F.Supp. at 1248-49, Judge Doyle spelled the nature of this preliminary process. First, the administrator should "make such immediate further investigation as the circumstances would reasonably permit." Second, the administrator should inquire into whether the circumstances of the conduct were such that "the prompt separation of the actor from the life of the campus community is required by reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property." Third, the student should be provided with a preliminary hearing at which he/she is "informed of the nature of the offense of which he has been accused, and . . . given an opportunity to make such statement as he may wish . . ." This may, according to the court, be sufficient if no serious factual disputes remain, but:

> On the other hand, if the student offers a detailed statement to the effect that he was not present at the time and place of the incident, and that there are witnesses, whom he identifies, to the fact that he was elsewhere at the time, it is probably constitutionally necessary to make such prompt investigation of his alibi as the circumstances permit. If the student admits his presence at the time and place of the incident, but offers a plausible explanation of his part in it which, if believed, might reasonably constitute an excuse or might reasonably indicate that his continued presence in the campus community involves no serious danger, it may become constitutionally necessary to reveal more fully the source and nature of the contradictory information which has been received by the university about his part in the incident, and even, if practical, to provide the accused student with an opportunity to confront one or more of his accusers.

See *Marin*, *supra*.

Thus, students whose conduct appears to make it impossible to provide the regular hearing prior to the suspension are entitled both to the regular hearing as soon thereafter as practicable and to whatever prior, more rudimentary procedures can be provided. From an alternative perspective, students who are awaiting a more formal hearing (such as a school board expulsion hearing) can be suspended in the interim only if they have been provided with a suspension hearing adequate to cover this interim period, taking into account its length. See cases discussed in the earlier portions of this section. See also §XI.C, "Timing of the Hearing."

B. NOTICE

"'[T]he fundamental requisite of due process of law is the opportunity to be heard,' . . . , a right that 'has little reality or worth unless one is informed that the matter is pending . . . . At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given _some_ kind of notice and afforded _some_ kind of hearing."

Goss v. Lopez, 419 U.S. 565, 579 (1975) (citations omitted; emphasis in original).

"The key to . . . notice in the administrative process is adequate opportunity to prepare . . . ."

Kenneth Culp Davis, _Administrative Law Treatise_, Sec. 8.05 at 530 (1958).

See also "Some Form of Notice and Hearing" in §IX.B, "What Kind of Due Process: Balancing Test."

Notice in Writing

Many lower court decisions have stated that notice should be in writing.

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 97-98 (3rd Cir. 1978) (consent decree)(disciplinary transfer of six weeks to a year);

Esteban v. Central Missouri State College, 299 F.Supp. 649 (W.D.Mo. 1967), _approved_, 415 F.2d 1077 (8th Cir. 1969), _cert. denied_, 398 U.S. 965 (1970) (suspension for two semesters);

Scoggin v. Lincoln University, 291 F.Supp. 161 (W.D.Mo. 1968) ("long-term suspension");

Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) ("suspension or expulsion");

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1346 (S.D. Tex. 1969) ("suspension for a substantial period of time");

Speake v. Grantham, 317 F.Supp. 1253, 1253 (S.D.Miss. 1970) (suspension);

Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972) (suspension "for any considerable period of time");

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from basketball practices);

Fielder v. Board of Education, 346 F.Supp. 722, 724 (D.Neb. 1972) (expulsion for remainder of year);

Mills v. Board of Education, 348 F.Supp. 866, 882-83 (D.D.C. 1972) (suspension or other exclusion from the student's normal program for more than two days, but no more than ten days):

Vail v. Board of Education, 354 F.Supp. 592, 603 (D.N.H.), *remanded for additional relief*, 502 F.2d 1159 (1st Cir. 1973) (suspension beyond 5 days);

Morale v. Grigel, 422 F.Supp. 988, 1003 (D.N.H. 1976) (suspension for one semester);

Caldwell v. Cannady, No. CA-5-994 (N.D.Tex., Jan. 25, 1972) (expulsion for remainder of semester);

Mello v. School Committee of New Bedford, C.A. No. 72-1146-F (D.Mass. Apr. 6, 1972) (all suspensions);

Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974) (indefinite suspension);

Doe v. Kenny, C.A. No. H-76-199 (D.Conn. 10/12/76) (Consent Decree) (Clearinghouse No. 19,358C) (disciplinary transfer).

Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y. 5/25/78) (Stipulation for Entry of Judgment and Judgment) (suspension beyond five days);

Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D.Pa. 11/3/80) (Consent Decree) (exclusion beyond ten days);

North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977) (expulsion).

Cf.: *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va. 1976) (transfer into special education classes).

But see:

Davis v. Ann Arbor Public Schools, 313 F.Supp. 1217 (E.D.Mich. 1970) (suspension for remainder of semester, student and parent had full knowledge of the reasons for the proposed discipline);

Warren v. National Association of Secondary School Principals, 375 F.Supp. 1043 (N.D.Tex. 1974) (dismissal from honor society, student was aware of the charges and the proceeding).

Notifying Parents

Lower courts in cases involving primary or secondary school students, rather than university students, have also stated that the parent as well as the student should receive notice.

Sullivan, *supra*;
Givens, *supra*;
Fielder, *supra*;
Mills, *supra*;
Vail, *supra*;
Graham v. Knutzen, 362 F.Supp. 881, 885 (D.Neb. 1973) (all suspensions);
Hairston, *supra*;
Caldwell, *supra*;
Doe v. Kenny, *supra*;
Winters v. Board of Education, *supra*;

Ross v. Disare, 500 F.Supp. 928 (S.D.N.Y. 1977) (suspensions beyond five days);
Bobbi Jean M., *supra*.

See: Keller v. Fochs, 385 F.Supp. 262, 266 (E.D.Wis 1974) (expulsion for remainder of year).

Compare:

Morale, supra, 422 F.Supp. at 1003 (notice to parent not required where student is not a minor).

In Goss v. Lopez, supra, 419 U.S. at 581, the Supreme Court, in speaking of the notice requirement for short-term suspensions (absent unusual circumstances -- see comments to §X.A). stated only that "the student be given oral or written notice of the charges against him. . ." (Note, however, that the focus of both parties had been on the complete absence of due process by the school, and not on the particular procedures which should have been required. Also note that the lower court had held that written notice to the parent was required, and the Supreme Court, after repeating the lower court's holdings, stated, "We affirm." 419 U.S. at 572.) In any event, the precedents of lower courts concerning written notice to the parent would still seem to apply to suspensions of more than ten days. Further, notice to the parent in some fashion, an issue not explicitly addressed by the Supreme Court, seems legally appropriate even for short suspensions, given the protected interest under the Due Process Clause which parents have in their children's education.

Meyer v. Nebraska. 262 U.S. 390, 399-400 (1923);
Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925);
Sullivan, supra, 307 F.Supp. at 1343.

See: Brown v. Board of Education of Tipton County, C.A. No. 79-2234 (W.D.Tenn. 5/3/79)(Clearinghouse No.26,964H)(for suspensions of up to ten days, parents must be sent notices which describe the charges and the procedure for obtaining a review of the principal's decision);

Kraut v. Rachford, 51 Ill.App.3d 206, 366 N.E.2d 497, 503 (Ill. App. 1977) (dropping student because of non-residency; "where the interests of a minor student are involved, his parents should be notified of the pending action").

Also, most states have statutes making the parent responsible for the child's attendance under compulsory attendance laws. See Sullivan, supra. (For further discussion, see §X.A., "Suspension for Ten Days or Less.")

Language of the Notice

The consent decree in Doe v. Kenny, supra, requires that the statement of rights contained in the notice be printed in Spanish and English. The consent judgment in Smith v. Ryan, C.A No. B-75-309 (D.Conn. 10/25/78) (Clearinghouse No. 25, 461A) (all forms of discipline), provides:

All notices, written or oral, required by this policy shall be in

English and in the primary language of the home. All notices shall be made in simple and commonly understood words to the extent possible.

School systems' obligations in this regard can be seen in both due process and non-discrimination terms. First, "The opportunity to be heard must be tailored to the capacities and circumstances of those to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970). Further, that opportunity "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Second, under the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1703(f), educational agencies must "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Similarly, under the regulations for Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, 34 C.F.R. §100.3(b)(2), all recipients of federal funds are prohibited from using criteria or methods of administration which have the effect of discriminating on the basis of national origin or which have the effect of substantially impairing the accomplishment of the objectives of the program for individuals of a particular national origin. Pursuant to Title VI, the Department of Education issued a memorandum (May 25, 1970) stating:

> School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

See also:

§V.A.1, "Language of the Rules."
§XI.F.2, "Right to an Interpreter:"
§III.A, "Race and National Origin Discrimination."
Lau v. Nichols, 414 U.S. 563 (1974) (failure to address language needs of Chinese students under Title VI);
Martin Luther King Jr. Elementary School Children v. Ann Arbor School District, 473 F.Supp. 1371 (E.D.Mich. 1979) (failure to address language needs of students who speak "black English," under Equal Educational Opportunities Act).

Timing of the Notice

See §XI.C, "Timing of the Hearing."

Unsuccessful Attempts to Notify

It has been held that failure to notify a student is not a denial of due process where the school makes diligent attempts and the student has failed to notify the school of his/her current address in violation of the school's regulations. Wright v. Texas Southern University, 392 F.2d 728 (5th Cir. 1968) (denial of readmission). Similarly, it has been held that the student's "refusal to accept the written notice cannot serve as the basis of a constitutional claim against the school." Morale v. Grigel, supra, 422 F.Supp. at 1003.

Notice of the Proposed Discipline

Right to notice of the proposed disciplinary action has been recognized in:

Mills v. Board of Education, supra, 348 F.Supp. at 882 ("describe the proposed disciplinary action in detail, including the duration thereof");
Corr v. Mattheis, 407 F.Supp. 847, 853-54 (D.R.I. 1976) (notice of hearing to consider disciplinary action against students insufficient for failing to inform them as to possible penalty of cut-off of financial aid);
Kelley v. Johnson, C.A. No. 75-91 (D.N.H., Feb. 12, 1976) (Clearinghouse No. 20, 622) (four-day suspension; notice inadequate because, although it informed student as to generally what was involved, it did not specifically state that disciplinary action was going to be taken and might result in suspension).

Cf: Hairston v. Drosick, supra, 423 F.Supp. at 184 (due process notice requirements fro transfer to special education classes would be met by implementing regulations which include notice, inter alia, "describing in detail the proposed or requested action").

Notice of the Charges

Specificity

The basic element of the right to notice is notice of "the charges." The term, however, needs to be spelled out for school officials, students, and parents in order to insure that the student and parent will be put on effective notice. This demands a certain degree of specificity.

Wasson v. Trowbridge, 382 F.2d 807, 812 (2nd Cir. 1967) (dismissal from Merchant Marine Academy);
Esteban v. Central Missouri State College, supra;
Scoggin v. Lincoln University, supra;
Givens v. Poe, supra;
Corr v. Mattheis, supra.

But see:
Jenkins v. Louisiana State Board of Education, 506 F.2d 992 (5th Cir. 1975);

Alex v. Allen, 409 F.Supp. 379, 385-88 (W.D.Pa. 1976) (30-day suspension);
Whiteside v. Kay, 446 F.Supp. 716, 721 (W.D.La. 1978) (expulsion for remainder of year).

Specificity in the notice serves several related purposes. It insures that the student and parent know what to prepare for and what kinds of issues they will need to address in the student's defense. See:

McGhee v. Draper, 564 F.2d 902, 911 (10th Cir. 1977) (discharge of nontenured teacher) ("A hearing where the plaintiff was faced with such a blast of complaints, and not knowing which incidents she needed to discuss, did not satisfy due process");
Navato v. Sletten, 560 F.2d 340, 346 (8th Cir. 1977) (denial of certificate of completion of residency program);
Matter of Grandal, 11 Ed.Dept.Rep. 144 (N.Y.Ed.Comm'r 1972) (suspension for remainder of year).

It provides meaning to the requirement that the hearing be confined in scope to the initial charges. See:

§XI.F.8, "Rules of Evidence."
Cf: Gonzales v. McEuen, 435 F.Supp. 460, 469(C.D.Cal. 1977) (expulsion for remainder of year).

It further provides meaning to the requirement that any finding of misconduct be based on a determination that the student committed the act(s) with which he/she was initially charged and that such conduct violates the rules in the initial charge. (See §XI.G.2, "Determination of Misconduct.") Without specificity in those initial charges, these requirements become meaningless. Finally, knowing waiver of the right to a hearing requires that the parent and student understand the specifics of the charge. Cf. Henderson v. Morgan, 96 S.Ct. 2253 (1976).

Courts have found particular notices to be insufficiently specific:

"Willful refusal to obey a regulation or order . . . which contributed to a substantial disruption . . .," Scott v. Alabama State Board of Education, 300 F.Supp. 163, 166 (M.D.Ala. 1969) (indefinite suspension);
"I find that harm to this University may result if you are continued in your present position," Lafferty v. Carter, 310 F.Supp. 465, 467, 469 (W.D.Wis. 1970) (professors suspended);
"Such statements as 'your son . . . continues to conduct himself in an irresponsible and disruptive manner' and 'he has been deliberately defiant of reasonable requests by his teachers,' 'on three occasions within the past few weeks,' without more in terms of approximate dates and at least some recitation of detail significant enough to identify the conduct to the plain-

tiff, do not comport with . . . due process," Keller v. Fochs, supra, 385 F.Supp. at 266.

See: Carey v. Savino, 397 N.Y.S.2d 311 (N.Y.Sup.Ct., Allegheny County, 1972), (expulsion)(notice must contain a statement not merely of who observed the alleged wrongful actions, but must also clearly allege the facts upon which the charges are based.)

But see:

Pierce v. School Committee, 322 F.Supp. 957, 962 (D.Mass. 1971) (notice of extended period of disruptive activities similar to Keller was held sufficient in considering expulsion of student who had a previous, long discipilnary record).

In Scoggin, supra, the charge of "planning and/or participating in a demonstration which led to the destruction of University property on Wednesday, October 18, 1967, at the Student Union Building," was held to be insufficient in that it failed to distinguish between those acts of planning and participation which were alleged to lead to the property destruction and the otherwise legally protected aspects of planning and participating in a demonstration. (See Substantive Rights, §I.B.5, "Assembly.") Compare Jenkins, supra, 506 F.2d at 1000-1001.

Elements of the Charges

One common formulation is "the specific charges and grounds which, if proven, would justify expulsion [or suspension] under the regulations of the Board of Education."

Dixon v. Alabama State Board of Education, 294 F.2d 150, 158 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (expulsion);
Vought v. Van Buren Public Schools, 306 F.Supp. 1388, 1393 (E.D.Mich. 1969) (expulsion for remainder of year);
Behagen v. Intercollegiate Conference, supra, 346 F.Supp. at 608 (suspension from basketball practices);
Winters v. Board of Education, supra ("a detailed statement of the specific behavior of the student").

Even this, however, probably does not supply enough guidance as to the meaning of "charges." A breakdown into (a) the alleged facts or acts of the students and (b) the regulations which such acts are claimed to violate would better indicate the components of the charge. See, for example, Mills v. Board of Education, supra ("state specific, clear and full reasons for the proposed action, including the specification of the alleged act upon which the disciplinary action is based and the reference to the regulation subsection under which such action is proposed").

Nature of Evidence and List of Witnesses

Some courts have also stated that the notice should include the nature of the evidence.

Scoggin, supra;
Sullivan v. Houston Independent School District, supra;
Vail v. Board of Education, supra;
Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (expulsion, with opportunity for G.E.D. program);
PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975)(suspensions which potentially exceeded 10 days), rev'd in part on other grounds, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), rev'd on other grounds, 98 S.Ct. 1042 (1978) (reversed on damage issue);
Doe v. Kenny, supra ("the details of the grounds for the proposed transfer, including a narrative of events leading to the proposed action and the names of witnesses against the student");
Bobbi Jean M. v. Wyoming Valley West School District, supra ("list of witnesses and copies of their statements or affidavits").

But see:
Whiteside v. Kay, supra.

Goss, supra, 419 U.S. at 581, 582, in speaking of requirements for short-term suspension, mentions "an explanation of the evidence" and "what the basis of the accusation is," but it is unclear whether the Court considered this part of the notice or part of the hearing.

Names of witnesses and nature of their testimony have been required in the notice in Caldwell v. Cannady, supra; and Graham v. Knutzen, supra.

Other courts have required that students be given notice of evidence, access to written evidence, and/or notice of witnesses in advance of the hearing without necessarily requiring that they appear in the notice of the hearing itself. See §XI.D.

Notice of Time and Place of Hearing

Failure to specify time and place of the hearing, of course, denies a meaningful opportunity to be heard and thus violates the basic tenet of due process. Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975); and cases cited therein. See:

Mills v. Board of Education, supra;
Doe v. Kenny, supra;
Bobbi Jean M., supra.

The issues concerning time of the hearing, including the relation to the time of notice, are discussed in §XI.C.

Notice of Procedural Rights

"The suspension-expulsion procedures grant parents or guardians and students many rights, e.g., the right to request the presence of certain individuals and the right to be accompanied by legal counsel if so requested. As the testimony of Mr. Webster and Mrs. Fuller indicates, many parents may not realize that they have these rights and there is no procedure presently in effect which so informs the parties. Consequently, parents and students may lose some rights which are contingent upon request simply because they did not know such a right existed.

"The opportunity to be heard must be 'granted at a meaningful time and in a meaningful manner.' . . . The Court finds that ignorance of the procedures in question and the rights thereunder may deprive the students and parents of a meaningful hearing . . . . The burden on the school authorities, on the other hand, is slight. As long as they provide the parents or guardians and students facing disciplinary action with reasonable notice of their rights under the procedures, due process is satisfied. While it is not for the Court to prescribe the exact method of implementing this duty, it should be noted that counsel for the defendants stated during oral argument that there would be no objection to enclosing a copy of the procedures in the letter sent to the parents or guardians explaining the reasons for the suspension or expulsion."

Graham v. Knutzen, supra, 362 F.Supp. at 883-84.

Accord:
- Gonzales v. McEuen, supra, 435 F.Supp. at 467 ("Notice to be adequate must communicate to the recipient the nature of the proceeding. In an expulsion hearing, the notice given to the student must include a statement not only of the specific charge, but also the basic rights to be afforded to the student: . . .;" expulsions held illegal because of failure of the notice to inform students of these rights);
- Mills v. Board of Education, supra;
- Doe v. Kenny, supra;
- Winters v. Board of Education, supra;
- Bobbi Jean M. v. Wyoming Valley West School District, supra.

Cf: Memphis Light, Gas and Water Division v. Craft, 98 S.Ct. 1554 (1978);
Tedeschi v. Wagner College, 427 N.Y.S.2d 760, 765 (N.Y.Ct.App. 1980).

The specific procedural rights are spelled out in other sections of §XI, below.

Notice of Sources of Legal Assistance

See generally §XI.F.1, "Right to Counsel or Other Representation."

See also:
Hairston v. Drosick, supra, 423 F.Supp. at 185 (due process required for transfer to special education classes would be fulfilled by

implementation of regulations requiring, *inter alia*, notice including "listing those agencies in the community from which legal counsel may be obtained for those unable to pay for counsel");

Mills v. Board of Education, *supra* ("If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including . . .");

Jordan v. School District of City of Erie, Pa., *supra*, 583 F.2d at 99 ("inform the parent or guardian and student of the availability of various organizations, such as Erie County Legal Services, to assist them in connection with Hearing II and provide the address and telephone number of such organizations in the notice");

Winters v. Board of Education, *supra* (sources for securing counsel, including legal services attorneys);

Bobbi Jean M. v. Wyoming Valley West School District, *supra*.

Notice of Availability of Diagnostic Services/Special Education Evaluation

See: *Mills v. Board of Education*, *supra* ("inform the child and the parent or guardian that if the child is thought by the parent or guardian to require special education services, that such child is eligible to receive, at no charge, the services of a public or private agency for a diagnostic medical, psychological or educational evaluation");

Hairston v. Drosick, *supra*.

See generally §III.C, "Discipline of Handicapped Students."

Provision of Alternative Education During Exclusion Period

See: *Mills v. Board of Education*, *supra* ("describe alternative educational opportunities to be available to the child during the proposed suspension period").

Notice of Right to Pre-Hearing Conference

See: *Jordan v. School District of City of Erie, Pa.*, *supra*, 583 F.2d at 98, ("The notice shall inform the parent or guardian and student of his/her right to an informal meeting with the building principal and other professional staff. At such informal meeting the building principal shall furnish a copy of the procedures set forth herein and the principal shall verbally explain to the parent or guardian and student their due process rights described therein").

C. TIMING OF HEARING

"A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It must be granted at a meaningful time and in a meaningful manner."
Armstrong v. Manzo, 380 U.S. 545, 552 (1965)

There are competing interests in setting the time for a hearing. On the one hand, either party may have an interest in speedy resolution. If -- as should normally be the case under the prior hearing rule discussed in §XI.A -- the student is in school up to the time of the hearing, school officials will usually not want much delay. If the student has been properly placed on emergency suspension pending the hearing, he/she will want the hearing held quickly. Assuming that the student has already had some form of preliminary hearing on the emergency suspension (see §XI.A), the legal upper time limits on the final hearing will probably vary depending upon the extensiveness of that preliminary hearing. Once the time limits appropriate to that preliminary hearing have elapsed, the full hearing must be held or the student must be permitted to return to school. See the discussion in:

Graham v. Knutzen, 361 F.Supp. 881, 882-83 (D.Neb. 1973).
Cf.: United States v. Lovasco, 97 S.Ct. 2044 (1977);
Montoya v. Sanger Unified School District, 502 F.Supp. 209 (E.D.Cal. 1980);
Mitchell v. Board of Trustees, 625 F.2d 660, 662 n.4 (5th Cir. 1980).

On the other hand, both parties have an interest in adequate time to prepare for the hearing. In Goss v. Lopez, however, the Supreme Court, without specifically addressing the issue of adequate preparation time, stated that for suspensions of ten days or less, in the absence of unusual circumstances (such as factual disputes), "There need be no delay between the time 'notice' is given and the time of the hearing." 419 U.S. 565, 582 (1975). Cf: Hillman v. Elliot, 436 F.Supp. 812 (W.D.Va. 1977) (three day suspension). [See §X.A on the factors which might make a short suspension "unusual." On the need for time to prepare in short suspension cases where there is a dispute, see Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 Inequality in Education, 42, 44 (1975).] But see Cintron v. State Board of Education, 384 F.Supp. 674, 680 (D.P.R. 1974) (suspensions for up to 5 days):

> A hearing can be meaningful only if the authorities have given the accused person an opportunity to plan, prepare and present his response and the evidence in mitigation or for defense.

In other cases, lower courts have often recognized the student's interest in adequate time to prepare, but the exact definition of adequate time in judicial terms will depend upon the nature of the particular case.

Navato v. Sletten, 560 F.2d 340, 345 n.9 (8th Cir. 1977) (denial of certificate of completion);

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98 (3rd Cir. 1978) (Consent Decree) (disciplinary transfer between six weeks and a year) (parent/student must request hearing within five days of notice, and hearing shall be scheduled within three to ten days of receipt of request);

Esteban v. Central Missouri State College, 277 F.Supp. 649, 651 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (suspension for two semesters, at least 10 days notice required);

Jones v. State Board of Education, 279 F.Supp. 190, 199 (M.D.Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 397 U.S. 31 (1970) (indefinite suspension, two days notice prior to hearing sufficient);

Marzette v. McPhee, 294 F.Supp 562, 567 (W.D.Wis. 1968) ("suspension or expulsion," 10 days notice required);

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1343 (S.D.Tex. 1969) ("suspension for a substantial period of time");

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss. 1970) (suspension) ("ten days notice..., this period to commence one day subsequent to the date of mailing of the notice");

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from basketball practices, at least 2 days notice required);

Fielder v. Board of Education, 346 F.Supp. 722, 724, 730, 731 (D. Neb. 1972) (expulsion for remainder of year, at least 3 days notice required);

Mills v. Board of Education of District of Columbia, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension or other exclusion from student's normal program for more than two days; hearing must be scheduled "at a time and place reasonably convenient to" parent, "within four school days of the date upon which written notice is given, and may be postponed at the request of the child's parent or guardian for no more than five additional school days where necessary for preparation");

Vail v. Board of Education, 354 F.Supp. 592, 603 (D.N.H.), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973) (exclusion beyond 5 school days);

Corr v. Mattheis, 407 F.Supp. 847, 853 (D.R.I. 1976) (termination of federal financial aid);

Morale v. Grigel, 422 F.Supp. 988, 1003 (D.N.H. 1976) (semester suspension, 2 days notice sufficient);

Adibi-Sadeh v. Bee County College, 454 F.Supp. 552, 555-56 (S.D.Tex. 1978) (four days sufficient for this particular campus);

Caldwell v. Cannady, No. CA-5-994 (N.D.Tex., Jan. 25, 1972) (expulsion for remainder of semester);

Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974) (indefinite suspension);
Sofair v. State University of New York Upstate Medical Center College of Medicine, 388 N.Y.S.2d 453, 458 (S.Ct.App.Div., 4th Dept., 1976) (dismissal from program);
Carey v. Savino, 397 N.Y.S.2d 311 (Sup.Ct., Allegheny County, 1977) (permanent expulsion, 21 hours insufficient);
Doe v. Kenny, C.A. No. H-76-199 (D.Conn. 10/12/76) (consent decree; suspension beyond five days; student and parent must receive at least five days prior notice).

Cf: Hairston v. Drosick, 423 F.Supp. 180, 185 (S.D.W.Va. 1976) (placement in special classes, due process required could be met by implementing regulations which provide at least 15 days prior notice).

Compare:

Kirtley v. Armentrout, 405 F.Supp. 575, 577-78 (W.D.Va. 1975) (3-day suspension, notification of the standard to be used on appeal at the appeal hearing itself adequate where student had more than one month's notice of the appeal hearing, student was referred more than a month previously to regulations which stated that this standard would be used, and student did not object to use of this standard at the hearing);
Bleicker v. Board of Trustees, 485 F.Supp. 1381, 1388 (S.D.Ohio 1980) (student failed to suggest how lengthier notice could have resulted in more effective presentation of her case).

Again, the student's right to adequate preparation time must be implemented in a way which does not interfere with his/her rights concerning a prior hearing under §XI.A. -- either by remaining in school pending the hearing or by receiving an adequate preliminary hearing to cover the interim period (including, where appropriate, under these two sections, adequate time to prepare for the interim hearing).

D. ACCESS TO EVIDENCE BEFORE THE HEARING

Courts have ruled that the notice of the hearing and the charges should contain notice of the evidence against the student in:

Scoggin v. Lincoln University, 291 F.Supp. 161, 171 (W.D.Mo. 1968) ("long-term suspensions");

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1346 (S.D.Tex. 1969) (suspension for "substantial period of time");

Vail v. Board of Education, 354 F.Supp. 592, 603 (D.N.H.), *remanded for further relief*, 502 F.2d 1159 (1st Cir. 1973) (suspensions beyond 5 days);

Marin v. University of Puerto Rico, 377 F.Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year);

Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse No. 15,369) (permanent expulsion);

PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill. 11/15/75) (suspensions which potentially exceeded 10 days), *rev'd in part on other grounds*, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), *rev'd on other grounds*, 98 S.Ct. 1042 (1978) (reversed on damage issue);

Doe v. Kenny, C.A. No. H-76-199 (D.Conn. 10/12/76) (consent decree) (Clearinghouse No. 19,358C) (disciplinary transfer);

Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days);

Sofair v. State University, 388 N.Y.S.2d 453 (S.Ct., App.Div., 4th Dept. 1976) (dismissal from medical school).

Courts have ruled that students must be given access in advance to affidavits and exhibits which will be used against them in:

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfers of six weeks to a year, "the student's school records, any tests or reports upon which said transfer is proposed");

Esteban v. Central Missouri State College, 277 F.Supp. 649, 651 (W.D.Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (suspension for two semesters);

Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) ("suspension or expulsion");

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss. 1970) (indefinite suspension, see below);

Mills v. Board of Education, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days);

Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974)(indefinite suspension, copies of any written reports to be sent to student at least five days before hearing);
Ross v. Disare, C.A. No. 74-Civ.-5047 (S.D.N.Y., June 13, 1977) (Clearinghouse #21,649)(suspension beyond 5 days, admission of written statements without prior notice violates state law).
See: Board of Education v. Butcher, 402 N.Y.S.2d 626 (Sup.Ct., App. Div., 1978)(teacher disciplinary proceeding, right to prepare defense required access to entire records of his students, with all identifying data deleted).

Wasson v. Trowbridge, 382 F.2d 807, 813 (2nd Cir. 1967) (dismissal from merchant marine academy, not necessarily entitled to see "confidential opinions of members of the faculty," although there should be an "evidentiary hearing into the nature of the concealed evidence, if any, and the reason for withholding it").

Courts have held that the student is entitled to a list of witnesses and a summary of their testimony in advance in:

Jordan v. School District, supra (names of all persons who will give relevant information);
Speake v. Grantham, supra, 317 F.Supp. at 1257, 1258 (denial of due process because students "were not given names of witnesses who would testify against them," other than one, and "were not furnished with copies of statements of witnesses who were to testify;" any further action must be based on hearing procedures, in which students "shall be informed of the names and addresses of all witnesses to be called by the University and furnish a statement consisting of the substance of potential witnesss' testimony at least five (5) days prior to the hearing, as well as copies of any other documentary evidence which will be introduced");
Bistrick v. University of South Carolina, 324 F.Supp. 942, 950 (D.S.C. 1971) (indefinite suspension, both names and content);
Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from basketball practices, list of witnesses);
Graham v. Knutzen, 362 F.Supp. 881, 885 (D.Neb. 1973) (all suspensions, students and parents must be notified of "names of teachers and administrators having primary knowledge of the facts");
Caldwell v. Cannady, No. CA-5-994 (N.D.Tex., Jan. 25, 1972) (expulsion for remainder of semester, list of names and summary of testimony);
Bobbi Jean M. v. Wyoming Valley West School District, supra.

Contra:

Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972) (expulsion for remainder of year);

Whiteside v. Kay, 446 F.Supp. 716, 721 (W.D.La. 1978) (expulsion for remainder of year).

To the extent that the evidence, statements, and names of witnesses are in writing, the parent's or eligible student's right to inspect is grounded not only in the Due Process Clause, but also in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g, governing student records in educational institutions receiving federal education funds,since the evidence would then be a "student record." See §XII.A, "Student Records."

For the right to confront and cross-examine at the hearing itself those persons who have made statements against the student, see §XI.F.4, "Adverse Witnesses and Evidence."

E. IMPARTIAL DECISION-MAKER

Courts have uniformly recognized the student's right to an impartial decision-maker. For a list of cases, see Center for Law and Education, The Constitutional Rights of Students, 240-42 (1976). Nevertheless, as that volume indicates, these courts have often found that the student in the particular case has not demonstrated sufficient evidence of partiality.

First, as one court has noted, "It is well settled that there is no constitutional right to be heard by a particular tribunal." Sill v. Pennsylvania State University, 462 F.2d 463, 469 (3rd Cir. 1972). Thus, while courts will in some circumstances rule that certain persons cannot be decision-makers, they will rarely spell out who should be the decision-makers.

One exception is Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days), where the court mandated "independent hearing officers," who "shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System."

Particular tribunals may also be established by consent orders. For example, the consent decree approved in Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98, 99 (3rd Cir. 1978) (disciplinary transfers of six weeks to a year), provides for a first level hearing:

> . . . before an At-Large Committee composed of one administrator and two employees of the School District selected by the Erie Education Association. None of the members of this At-Large Committee shall be from the student's school building. The members of the At-Large Committee shall serve on a rotating basis. . .

and a second-level, de novo hearing before an impartial hearing examiner:

> The impartial hearing examiner at Hearing II shall be a representative of either the Bureau of Mediation or the American Arbitration Association. Such hearing examiner shall be paid by the School District. The hearing examiner shall be selected from a list of five (5) members, the School District striking one name and the parent or guardian and student or his/her representative striking the next, and continuing in like manner until one name remains.

Second, students have generally failed in their attempts to argue that hearing officers or panels consisting solely of administrators or of persons employed and appointed by the administration are by their very nature biased.

See: Winnick v. Manning, 460 F.2d 545, 548-49 (2nd Cir. 1972);
Murray v. Baton Rouge Parish School Board, 472 F.2d 438, 443 (5th Cir. 1973);
Jenkins v. Louisiana State Board of Education, 506 F.2d 992, 1003 (5th Cir. 1975);
Hillman v. Elliot, 436 F.Supp. 812, 816 (W.D.Va. 1977).
See especially:
Graham v. Knutzen, 351 F.Supp. 642, 669 (D.Neb. 1972).
Cf: Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976).

Nevertheless, a few courts have recognized that the very role of an administrator may make him/her an inappropriate tribunal.

See: Quintanilla v. Carey, Civil No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse No. 15,369) (permanent expulsion, "None of the administrators of Kelvyn Park High School shall serve as hearing officers");
PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill. 11/15/75) (suspensions which potentially exceeded 10 days, same requirement as Quintanilla), rev'd in part on other grounds, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), rev'd on other grounds, 98 S.Ct. 1042 (1978) (reversed on damage issue);
Everett v. Marcase, 426 F.Supp. 397, 402 (E.D.Pa. 1977) (transfers, "The hearing officer should not, of course be the principal of the school who holds the first informal hearing and recommends the transfer. Likewise, it obviously should not be someone under his direct control or supervision or below him in the 'chain of command,'" although it may be a superior of the principal);
Mills v. Board of Education, supra;
Jordan v. School District, supra;

Recognition of the impartiality problems raised when administrators serve as hearing officers may be found in the Education for All Handicapped Children Act, 20 U.S.C. §1415(b)(2), which declares that "no hearing conducted pursuant to the requirements of this paragraph [i.e., special education hearings] shall be conducted by an employee of such agency or unit involved in the education or care of the child."

See also:
34 C.F.R. §300.507 (the implementing regulations);
Department of Education, "Nondiscrimination in Federally Assisted

Programs: Policy Interpretation No. 6," 43 Fed.Reg. 36034 (8/14/78) (school board members may not serve as special education hearing officers);

Campochiaro v. Califano, C.A. No. H-78-64 (D.Conn. 5/18/78) (Clearinghouse No. 23,909B) (same);

Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980) (state superintendent of education may not serve as special education hearing officer);

Vogel v. School Board, 491 F.Supp. 989 (W.D.Mo. 1980) (same);

Monahan v. Nebraska, 491 F.Supp. 1074 (D.Neb. 1980), aff'd, 645 F.2d 592 (8th Cir. 1981) (same);

Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981) (state education agency may not make the decision);

Grymes v. Madden, 672 F.2d 321 (3rd Cir. 1982) (similar).

Third, in some courts, even a certain degree of prior involvement has not been held fatal to impartiality in the absence of some specific evidence of bias, prejudgment, or a personal stake in the outcome.

See: Cases in The Constitutional Rights of Students, supra;

Hillman v. Elliot, supra, 436 F.Supp. at 816 (three-day suspension; principal not disqualified from serving as hearing officer because of his initial meeting in which he made a preliminary decision to suspend, absent evidence of actual bias; prior involvement creates impermissable bias only when it comes from outside the adjudicatory process, just as a judge is not disqualified by prior knowledge which comes within the courtroom in hearing preliminary motions);

Cf: Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976) (dismissal of striking teachers by school board which had been involved in negotiating issues which led to the strike, some familiarity with the facts of the case gained by an agency in performance of its statutory duties does not disqualify it as a decision-maker).

Nevertheless, various forms of involvement have been held to violate the guarantee of impartiality in:

Wasson v. Trowbridge, 382 F.2d 807, 813 (2nd Cir. 1976) (dismissal from maritime academy, "prior official involvement in a case renders impartiality most difficult to maintain," "Wasson was entitled to show that members of the panel had had such prior contact with his case that they could be presumed to have been biased");

Sullivan v. Houston Independent School District, 475 F.2d 1071, 1077 (5th Cir. 1973) (suspension for remainder of semester, where "the incidents for which Paul was suspended were cast largely in terms of a personal confrontation with Mr. Cotton . . . it is difficult to imagine that Mr. Cotton could have given Paul an impartial hearing");

Caldwell v. Cannady, 340 F.Supp. 835, 839 (N.D.Tex. 1972) (expulsion for remainder of semester, "For the board to act as investigator, prosecutor, judge and jury makes a mockery of the notion of a fair hearing");

Warren v. National Association of Secondary School Principals, 375 F.Supp 1043, 1047 (N.D.Tex. 1974) (dismissal from honor society, hearing defective where accusing witness was on the hearing panel);

Martin v. University of Puerto Rico, 377 F.Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year, right to "impartial, previously uninvolved official");

Gonzales v. McEuen, 435 F.Supp. 460, 464-66 (C.D.Cal. 1977) (expulsion for remainder of year, hearing defective where school district attorneys mixed roles of prosecuting the case and advising the board which heard the case, and where superintendent, who also was involved in prosection of the case, sat with the board during its deliberations);

Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974) (indefinite suspension, particular facts here justified court's removing hearing from principal and superintendent previously involved in gathering facts and making recommendations without impugning their "motives or good faith");

Bradley v. Milliken, C.A. No. 35257 (E.D.Mich., July 3, 1975) (all due process, "When the principal is involved in the accusation process, another person must replace the principal to conduct the hearing");

PUSH v. Carey, supra, (witness may not be hearing officer, due process denied where decision was made by major factual accusers);

Williams v. Austin Independent School District, C.A.No. A-78-CA-215 (W.D.Tex. 8/26/81) (Clearinghouse No. 32,431) (suspension for remainder of quarter, "Allowing the adjudicator to play two roles, one partisan and one judicial, necessarily involves lack of due process," such as here, where two witnesses were members of the panel that recommended his punishment, and were allegedly struck by the student, creating "the probability of bias");

Marshall v. Maguire, 424 N.Y.S.2d 89 (Sup.Ct., Nassau County, 1980) (expulsion, participation by same college official in each of the first two levels of the disciplinary process, in violation of school's own rule, "so taints the proceedings" that the student's right to an impartial tribunal was impaired);

In re DeVore, 11 Ed.Dept.Rep. 296 (N.Y.S.Ed.Comm'r 1972) (indefinite suspension, right to impartiality violated by superintendent's reliance on personal knowledge of student's arrest).

Cf: Steffen v. Board of Directors, 377 A.2d 1381 (Pa.Cmwlth. 1977) (teacher dismissal, school board properly kept prosecutorial and judicial functions separate by use of two separate attorneys);

Staton v. Mayes, 522 F.2d 908, 912-15 (10th Cir. 1977), cert. denied, 96 S.Ct. 309 (1977) (administrator's dismissal denied due process where board members made prior statements on the merits, not merely statements on related policy issues, Hortonville distinguished);

Bogart v. Unified School District, 432 F.Supp. 895 (D.Kan. 1977) (dismissed school teacher was denied an impartial tribunal when school board, which based its initial decision on teacher's jury conviction for possession of marijuana, reaffirmed its decision at second hearing without any further evidence of wrongdoing after judge acquitted the teacher);

Barham v. Welch, 478 F.Supp. 1246 (E.D.Ark. 1979) (superintendent discharge, evidence established that two of the four board members had prejudged the matter and were incapable of impartial decision).

Compare:

Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (refusing to find violation where school board attorney presents evidence against student and advises board on the law);

Kraut v. Rachford, 51 Ill.App.3d 206, 366 N.E.2d 497, 504-05 (Ill. App. 1977) (dropping student because of non-residency; "Due process of law, by necessity, requires an impartial decision maker and while this role is not barred to one involved in some aspects of a case, the final arbiter should not have participated in making the determination under review;" not violated here where administrator took previous action concerning different decision);

Carey v. Savino, 397 N.Y.S.2d 311 (Sup.Ct., Allegheny County, 1977) (expulsion) ("While the conduct of respondents' attorney at the hearing was probably within the guidelines of due process, at least for the appearance of fairness, it would have been more proper to aid the hearing officer only when requested to do so, and also not to be present during the deliberations of the board").

The right to an impartial tribunal is linked to certain other basic rights, including the student's right of access to all evidence which will be used (§XI.D.), to confront and cross-examine all witnesses whose testimony is considered (§XI.F.4), to a presumption of innocence (§XI.F.7), to a hearing confined to the scope of the charges in the initial notice (§XI.F.8.c), and to a decision based solely on the evidence presented at the hearing (§III.G.1). See, for example, In re DeVore, supra, 11 Ed. Dept.Rep. at 298:

> The superintendent chose, however, to rely upon his personal knowledge of the fact of arrest and the basis for the arrest. It is evident from a reading of the transcript that he utilized such personal knowledge as an alternative to testimony. There are, of course, three essential defects in this procedure.
>
> First, a decision to impose a disciplinary penalty and the extent of the penalty must be supported by the evidence contained in the record. This cannot be the case where the fact of arrest is established solely from the private knowledge of the hearing officer. Secondly, it is impossible for the student to cross-examine or in any way rebut the private, nontestimonial knowledge of the hearing officer. Third, and perhaps most serious, is the fact that the hearing officer loses his neutral posture and, in effect, becomes a silent witness in support of the charges. Nothing is more essential than a neutral hearing officer (Matter of Dishaw, 10 Ed. Dept.Rep 34 (1970).

The argument that a particular tribunal is not impartial will generally be strengthened, as some of the decisions above indicate, by presenting very concrete evidence of bias. It may even be possible to convince some courts of what many students, parents, and staff will readily acknowledge -- that the very nature of the administrator's role, operating within a hierarchical chain of command in which success depends upon good working relationships, creates inevitable pressures not to issue too many decisions against subordinates (teachers, lower-level administrators) as well as superiors. However, such an argument should be heavily buttressed by expert, student, parent, and staff witnesses who can testify to the phenomenon.

Recognition of this phenomenon can create a demand either for independent hearing officers, such as those mandated in Mills or at the second level hearing in Jordan, or for student courts or student-staff panels, which are used by some districts. Full and active student participation is critical for addressing issues of discipline and student rights. Cf. Nitzberg v. Parks, 525 F.2d 378, 385 (4th Cir. 1975). It should be cautioned, however, that placing students on hearing panels is often the easiest step, in political terms, toward student involvement in decision-making. School systems that are otherwise unwilling to allow students a real role in decisions will sometimes do so in this area. It is probably meaningless to place students on a hearing panel in the absence of other forms of substantial student involvement in decisions -- since they are then being told to enforce rules which they have had no role in shaping. Thus, placing students on hearing panels should be done only as part of a much broader effort to push full, active student involvement in all spheres.

For more on impartiality, see Kern Alexander, "Administrative Prerogative: Restraints of Natural Justice on Student Discipline," 7 J.Law. & Ed. 331 (1978).

F. PROCEDURES AT THE HEARING

1. RIGHT TO COUNSEL OR OTHER REPRESENTATION

Goss

In Goss v. Lopez, 419 U.S. 565, 583 (1975), the Supreme Court specifically declined to hold that the right to counsel was required, countrywide, for hearings in the normal, short-suspension case with no unusual circumstances, but did state that in "difficult cases" of short suspensions the disciplinarian may decide that the use of counsel is warranted, and that unusual circumstances [such as material factual disputes] may require more elaborate procedures. See:

§IX.B, "What Kind of Due Process;"
§X.A, "Suspension for Ten Days or Less;"
Peter Roos, "Goss and Wood: Due Process and Student Discipline," 20 Inequality in Education 42, 44 (1975).

Lower Courts Denying Right to Counsel

Lower courts, which provide guidance at least as to the requirements for longer-term discipline, have divided on the issue of right to a lawyer. Those cases which have denied this right have generally relied on other evidence that, in the particular case, the hearing was nevertheless fair and absence of counsel did not create substantial harm. This line of reasoning is best represented by Wasson v. Trowbridge, 382 F.2d 807, 812 (2nd Cir. 1967) (dismissal from military academy):

> The requirement of counsel as an ingredient of fairness is a function of all the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events of May 30th should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.

Claims of right to counsel have been denied by other courts which have found the particular proceedings otherwise fair in:

Hagopian v. Knowlton, 470 F.2d 201, 211-12 (2nd Cir. 1972) (separation from military academy, although student is entitled to seek

advice and retain counsel to assist in preparing his defense);
Navato v. Sletten, 560 F.2d 340, 345 n.8 (8th Cir. 1977) (denial of certificate of completion of residency program);
Due v. Florida A. & M. University, 233 F.Supp. 396, 403 (N.D.Fla. 1963) (Judge Carswell) (indefinite suspension);
Whitfield v. Simpson, 312 F.Supp. 889, 894 (E.D.Ill. 1970) (expulsion);
Haynes v. Dallas County Junior College District, 386 F.Supp. 208, 211-12 (N.D.Tex. 1974) (suspensions);
Garshman v. Pennsylvania State University, 395 F. Supp. 912, 921 (M.D.Pa. 1975)(dismissal).

Right to counsel has been denied in a hearing before a body which was only "advisory" and "investigative,"

Barker v. Hardaway, 283 F.Supp. 228, 238 (S.D.W.Va.), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969);

and in a school guidance conference,

Madera v. Board of Education, 386 F.2d 778 (2nd Cir. 1967).

Cf.: *Downing v. LeBritton*, 550 F.2d 689 (1st Cir. 1977) (in the absence of any specific showing of inadequate opportunity to defend, discharged employee not entitled to be represented by outside counsel where university rules permitted him to be represented by any of several thousand fellow employees, there was access to counsel for preparation and advice, and there were other significant procedural protections);
Bleicker v. Board of Trustees, 485 F.Supp. 1381, 1388 (S.D.Ohio 1980) (veterinary student failed to suggest how presentation of her case would have been aided by counsel, particularly when counsel presented same evidence to court, with no difference in outcome).

Lower Courts Requiring Right to Counsel

The majority view now seems to require counsel, at least for long-term discipline. In *French v. Bashful*, 303 F.Supp. 1333, 1337 (E.D.La. 1969), *modified and aff'd per curiam*, 425 F.2d 182 (5th Cir. 1970) (counsel necessary where case against student was prosecuted by a second-year law student), the court spoke to the value of counsel:

> Although the right to counsel was not among the rights specifically enumerated by the court in *Dixon [v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961)], it cannot be denied that the assistance of an attorney in a trial-type proceeding is of considerable value. . . . Counsel is best qualified to prepare a defense to the charges, examine the evidence against the defendent, cross-examine witnesses if such a right is permitted, and to otherwise plead the defending student's cause.

The right to cross-examine, in particular, will often be meaningless unless done by someone with previous experience and training.

In Fielder v. Board of Education, 346 F.Supp. 722, 731n.7 (D.Neb. 1972) (expulsion for the remainder of the year), the court gave other reasons:

> Permission to appear at the hearing with counsel will have the tendency to hold the proceedings to genuine issues and to assure the student's acting advisedly.

Additional support for a right-to-counsel requirement has been noted in the National Juvenile Law Center's commentary to its model code:

> The presence of counsel is critical to the protection of a student's interests in any politically charged situation. Further, the presence of a representative in addition to the party is critical when one considers the difficulty of maintaining one's control and reason in a highly charged situation such as a disciplinary hearing where one is vulnerable.

Right to counsel has also been required in:

Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion for remainder of year);
Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978) (where student in school disciplinary hearing was also facing criminal charges, it was denial of due process to refuse request of student who wanted counsel present for advice and consultation only; decision limited to this fact pattern);
Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 99 (3rd Cir. 1978)(consent decree) (disciplinary transfer for from six weeks to one year);
Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 752 (W.D.La. 1968) (expulsion);
Keene v. Rodgers, 316 F.Supp. 217, 221 (D.Me. 1970) (dismissal from maritime academy);
Speake v. Grantham, 317 F.Supp. 1253 (S.D.Miss. 1970) (one-year suspension);
Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972)(exclusion "for any considerable period of time");
Mills v. Board of Education, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension, transfer or other exclusion from student's normal program for more than two days);
Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year);
Corr v. Mattheis, 407 F.Supp. 847, 853 n.9 (D.R.I. 1976) (termination of federal financial aid);

Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D.Cal. 1977) (expulsion for remainder of year);
Mello v. School Committee of New Bedford, C.A. No. 72-1146-F (D.Mass., Apr. 6, 1972) (all suspensions);
Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974) (indefinite suspension):
Quantanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse No. 15,369) (permanent expulsion);
PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975) Clearinghouse No. 17,507) (suspensions potentially beyond 10 days), rev'd in part on other grounds sub. nom. Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), rev'd, 98 S.Ct. 1042 (1978) (reversing appeals court's holding on damages);
Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y. 5/25/78) (Stipulation for Entry of Judgment and Judgment) (suspension beyond five days);
Gi[illegible]s v. Redfern, C.A. No. ________, (N.H.Super.Ct., Chesire County, Jan. 18, 1977) (Clearinghouse No. 20,624) (suspension for remainder of semester);
Goldwyn v. Allen, 281 Misc.2d 94, 281 N.Y.S.2d 899, 905 (1967) (withholding the right to take state Regents exam for one year);
Carey v. Savino, 397 N.Y.S.2d 311 (1977) (permanent expulsion, short period between notice and hearing denied student adequate opportunity to obtain counsel).

See: In re Gault, 387 U.S. 511 (1967) (right to obtain counsel in juvenile court, regardless of whether proceedings are criminal or noncriminal);
Charles Alan Wright, "The Constitution on Campus," 22 Vand.L.Rev. 1027, 1075 (1969).

Cf.: Doe v. Kenny, C.A. No. H-76-199 (D.Conn., Oct. 12, 1976) (consent decree) (right to counsel for hearings concerning disciplinary transfer);
Bobbi Jean M. v. Wyoming Valley West School District, C.A.No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days).

One court ruled that the students had the right to the presence of counsel for the purposes of advice, but that the students, and not their counsel, had the right to question adverse witnesses.

Esteban v. Central Missouri State College, 277 F.Supp. 649, 651-52 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).

See: Gabrilowitz v. Newman, supra.

Cf.: Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) ("suspension or expulsion," includes right to presence of counsel but does not state whether or not counsel may represent the student in presenting the case and cross-examining witnesses).

Another court refused to hold that a school rule was invalid because it permitted representation by attorneys but did not permit representation by non-lawyers. Graham v. Knutzen, 362 F.Supp. 881, 884 (D.Neb. 1973) (all suspensions). But see, for example, Mills v. Board of Education, supra ("representative of his own choosing, including legal counsel").

Right to Counsel at Public Expense

Where raised, courts have refused to require that legal assistance be provided at public expense for certain disciplinary hearings when the student cannot afford his/her own counsel.

Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972) (expulsion for remainder of semester);
Everett v. Marcase, 426 F.Supp. 397, 402 (E.D.Pa. 1977) (disciplinary transfers).
Cf.: Givens v. Poe, supra, ["right to be represented by counsel (though not at public expense)"].

Notice of Sources of Free Legal Assistance

Cases requiring that students and parents be notified of sources of legal assistance include:

Mills v. Board of Education, supra, 348 F.Supp. at 882;
Jordan v. School District, supra, 583 F.2d at 99;
Winters v. Board of Education, supra.
See: Hairston v. Drosick, supra, 423 F.Supp. at 185.

These cases are more fully described in §XI.B, "Notice."

2. RIGHT TO INTERPRETER

The right to an interpreter at the hearing may be grounded in the Due Process Clause, anti-discrimination laws, and, where applicable, state bilingual education laws.

"All hearings and conferences required by this policy shall be conducted by persons fluent in the primary language of the student's home or with the assistance of an interpreter."

Smith v. Ryan, C.A. No. B-75-309
(D.Conn. 10/25/78) (consent judgement)
(Clearinghouse No. 25,461A)
(all forms of discipline)

"A student is entitled to the services of a translator, to be provided by the Board of Education, upon the request of the student, his parent(s) or guardian(s)."

Doe v. Kenny, C.A. No. H-76-199
(D.Conn. 10/12/76)(consent decree)
(disciplinary transfers)

"The opportunity to be heard must be tailored to the capacities and circumstances of those to be heard."

Goldberg v. Kelly, 397 U.S. 254,
268-69 (1970).

"[The opportunity to be heard] must be granted at a meaningful time and in a meaningful manner."

Armstrong v. Manzo, 380 U.S. 545,
552 (1965).

"A recipient [of federal funds] . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

34 C.F.R. §100.3(b)(2) [regulations
implementing Title VI of the 1964 Civil
Rights Act, 42 U.S.C. §2000d].

"No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by-- . . .

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

20 U.S.C. §1703 (Equal Educational
Opportunities Act of 1974).

See also:

§III.A, "Race and National Origin Discrimination" (especially subsection on bilingual students);

§V.A.1, "Language of Rules;"

§XI.B, "Notice" (subsection on language of notice).

3. OPEN/CLOSED HEARING

"It would seem fair to a student who desired to exclude persons not connected with the hearing proceedings to require that the hearing be private. Especially for minors, the desire for privacy and anonymity would clearly outweigh any public interest in keeping the doors to the hearing room open. The issue has not come up in litigation, probably because school officials uniformly agree to this general principle. In contrast, the student who strongly desires to make the hearing public stands on different footing. There are space limitations and considerations of order and atmosphere which would argue for at least limiting the number of observers who may enter the room. On the other hand, however, the exclusion of a limited number of representatives of student newspapers or governing bodies have serious first amendment implications quite apart from the rules of procedural due process. In shaping its general order, the court in Mills v. Board of Educ., 348 F.Supp. 866, 882 (D.D.C. 1972) [suspension, transfer, or other exclusion from student's normal program for more than two days] made it optional with the student/parent: 'The hearing shall be a closed hearing unless the child, his parent or guardian requests an open hearing.'"

Center for Law and Education, The Constitutional Rights of Students, 246 (1976).

Right to Closed Hearing

For more on the right to a closed hearing see:

Hairston v. Drosick, 423 F.Supp. 180, 183 (S.D.W.Va. 1976)(placement in special education classes, the due process required would be fulfilled by implementing regulations which provide, in part, "that the hearing shall be closed to the public unless the parents request an open hearing");

Marston v. Gainesville Sun Publishing Co., Inc., 341 So.2d 783 (Fla. App. 1976) (student disciplinary hearings properly closed, open meeting law does not make them open to public or press without student consent).

Cf.: Doe v. Kenny, C.A. No. H-76-199 (D. Conn., Oct. 12, 1976) (consent agreement) (disciplinary transfers, "student will have the right . . . to request that the panel exclude all those persons who do not have a legitimate educational interest in the student");

Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days).

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sec. 1232g, which governs the privacy of student records in educational institutions which receive federal education funds, may also have implications for the student's right to a closed hearing, since information from a student's record cannot be released, orally or in writing, to anyone without written consent of the parent (or student if over eighteen), except to school personnel with legitimate educational interests in the records (and certain other exceptions not relevant to disciplinary hearings). (See §XII.A, "Student Records."

Right To Open Hearing

As to the student's right to an open hearing, one court has noted,

> This Court has recently expressed its opinion that such hearings should be open to the press when this is possible without interference with the orderly operation of the educational institution.

Moore v. Student Affairs Committee, 284 F.Supp. 725, 731 (M.D.Ala. 1968) (indefinite suspension, but court declined to invalidate the hearing on this point because of other extensive procedural safeguards, existence of a transcript, and a threat to order).

See: Mills, supra;
Hairston, supra.

Cf. Morale v. Grigel, 422 F.Supp. 988, 1004 (D.N.H. 1976) (one term suspension):

> Whether or not an open hearing is constitutionally mandated is an issue which I need not resolve in this case, but I do note that for cases which attract schoolwide attention, open hearings would avoid, at a minimum, the appearance of arbitrary decision-making violative of the Fourteenth Amendment.

The right was denied in:

Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972) (expulsion for remainder of semester;
Zanders v. Louisiana State Board of Education, 281 F.Supp. 747, 768 (W.D.La. 1968) (expulsion);
General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133, 146-47 (8th Cir. 1968).

4. ADVERSE WITNESSES AND EVIDENCE (CONFRONTATION, CROSS-EXAMINATION AND COMPULSORY PROCESS)

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses."
>
> Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

Distinguishing Cross-Examination, Confrontation, Compulsory Process -- and Their Purposes

Judicial language sometimes fails to distinguish between confrontation and cross-examination. Cross-examination, with nothing more, is simply the questioning of witnesses who testify at the hearing against you. It does not necessarily guarantee that witnesses who have made statements against you prior to the hearing will be present at the hearing.

The right of confrontation guarantees that those who make statements against you will present themselves in person at the hearing. Without the right of confrontation, the case against you could be presented solely through written statements, and your right of cross-examination would be irrelevant.

Compulsory process is a system under which any witness who is properly asked to appear at the hearing must do so. Confrontation places a restriction on the prosecution -- if a witness does not appear, the prosecution cannot use statements of that witness against you. Compulsory process, on the other hand, places a burden on the witness -- if called, he/she must appear or, presumably, will face a penalty of some kind. Further, compulsory process systems can be used to call witnesses for as well as against the student. For instance, a student or teacher who witnessed an event and whose testimony would tend to support the accused student may be reluctant to appear. Without compulsory process, adverse testimony from another witness might then go unrebutted. Further, compulsory process may be superior to confrontation alone even in dealing with adverse testimony, since it helps eliminate the possibility that statements which supposedly are not to be considered because the witness has not appeared are nevertheless influencing the hearing tribunal's judgment.

Confrontation and cross-examination are relied upon to insure that the hearing arrives at the truth -- the questioning of adverse witnesses, when properly used, can bring out new facts, reveal unnoticed and misleading assumptions in the previous testimony, provide a basis for deciding between witnesses who give conflicting testimony, and place already known facts in proper context. Beyond its contribution to correct results, however, confrontation lends an important element of fairness to the process itself. The right to "look your accusers in the eye" is central to the creation of a legitimate forum.

General Legal Background

As in other areas of due process, courts have tended to take a flexible approach, considering the extent to which confrontation and cross-examination will contribute to a fair determination. Thus, in Winnick v. Manning, 460 F.2d 545, 549-50 (2nd Cir. 1972) (suspension for one semester), the court stated that, while cross-examination "might have been essential to a fair hearing" if credibility had been at issue, in this case "cross-examination would have been a fruitless exercise," since the one point on which the student had wanted cross-examination had no bearing on the outcome and the point in the witness's testimony which did affect the outcome was admitted by the student. In contrast, the court in DeJesus v. Penberthy, 344 F.Supp. 70, 75-76 (D.Conn. 1972) (expulsion), distinguished Winnick and stated,

> This is not to suggest that adherence to the hearsay rule is an invariable requirement of the Due Process Clause. But whereas here there is a factual dispute on critical issues that will determine the propriety of such a serious penalty as expulsion, due process does require that readily available testimony be presented to the fact-finders in person, at least in the absence of any extenuating circumstances.

The court further found that there was no basis for denying the right of cross-examination, holding that school officials had the burden of demonstrating unusual circumstances which would justify the absence of cross-examination, at least in situations as serious as expulsion in which there is a significant factual dispute. (See quote below concerning student witnesses.)

Most decisions have required that students be provided rights of confrontation and cross-examination.

Right to Cross-Examine

Courts have required the opportunity for cross-examination of adverse witnesses, without mentioning (or explicitly denying) any right of confrontation, in:

Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973)(expulsion for remainder of year);
Esteban v. Central Missouri State College, 277 F.Supp. 649, 651 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969),

cert. denied, 398 U.S. 965 (1970) (right is to be exercised by the student, not by his/her legal counsel) (exclusion for two semesters);

Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) ("suspension or expulsion");

Keene v. Rodgers, 316 F.Supp. 217, 221 (D.Me. 1970) (dismissal from maritime academy);

Marin v. University of Puerto Rico, 377 F.Supp. 613, 623 (D.P.R. 1974) (suspension for more than one year);

Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D.Mass., Apr. 6, 1972) (any exclusion);

Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill, Mar. 31, 1975) (Clearinghouse No. 15,369) (permanent expulsion);

PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975) (Clearinghouse No. 17.507) (suspensions potentially beyond 10 days), *rev'd in part on other grounds sub nom.* *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976)(reversed because of lower court's failure to award damages to students), *rev'd* 98 S.Ct. 1042 (1978)(reversed and remanded on damages issue);

Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y. 5/25/78)(Stipulation for Entry of Judgment and Judgment)(suspension beyond five days).

Contra:

Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (expulsion).

But see:

Winnick v. Manning, *supra*;

Davis v. Ann Arbor Public Schools, 313 F.Supp. 1217, 1227 (E.D.Mich. 1970) (suspension for remainder of semester);

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from intercollegiate basketball competition for remainder of season);

Fenton v. Stear, 423 F.Supp. 767, 772 (W.D.Pa. 1976) (3-day in-school suspension, student had already admitted witness's accusation).

Right to Confront and Cross-Examine

Courts have recognized a right both to confront and cross-examine adverse witnesses in:

Speake v. Grantham, 317 F.Supp. 1253, 1257-58 (S.D.Miss. 1970);

DeJesus v. Penberthy, *supra*;

Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972)(suspensions "for any considerable period of time");

Fielder v. Board of Education, 346 F.Supp. 722, 724, 730-31 (D.Neb. 1972)(persons with primary awareness of the facts must be present and available for cross-examination; it is the school's duty to call them, not the student's)(expulsion for remainder of year);

Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or exclusion from student's normal program for more than two days);

Corr v. Mattheis, 407 F.Supp. 847, 853 (D.R.I. 1976)(termination of federal financial aid);

Gonzales v. McEuen, 435 F.Supp. 460, 467-70 (C.D.Cal. 1977) (expulsion for remainder of year);

Dillon v. Pulaski County Special School District, 468 F.Supp. 54 (E.D Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979)(violation of due process to expel based on written statement of teacher without opportunity to confront and cross-examine):

Cardwell v. Albany Unified School District, C.A. No. 70-1893 (N.D.Cal., Sept. 8, 1970) (transfer);

Gratton v. Winooski School District, C.A.No. 74-86 (D.Vt., Apr. 10, 1974) (right to cross-examine, school to assist in arranging attendance of anyone who submitted evidence) (indefinite suspension);

Tibbs v. Board of Education, 276 A.2d 165, 170 (N.J. 1971);

DePrima v. Columbia-Green Community College, 392 N.Y.S.2d 348 (N.Y.Sup. Ct., Albany County, 1977) (disciplinary probation);

North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977) (expulsion).

Cf: *McGhee v. Draper*, 564 F.2d 902, 911 (10th Cir. 1977) (discharge of non-tenured teacher, right to confront and cross-examine where accusers were attacking her morality and fitness to teach);

Hairston v. Drosick, 423 F.Supp. 180, 185 (S.D.W.Va. 1976) (due process required for placement in special education classes would be satisfied by implementing regulations which provide, in part, for right to confront and cross-examine all witnesses);

Franklin v. District Board of Education, 356 So.2d 931 (Fla.App. 1978) (expulsion) (under state law, hearsay evidence could be used as supplementary proof, but such affidavits are not sufficient alone to support a finding unless they would be admissable in civil actions);

Ross v. Disare, C.A. No.74-Civ.-5047 (S.D.N.Y., June 13, 1977) (Clearinghouse No.21,649)(in suspensions beyond 5 days, use of written statements instead of presenting witnesses violates state statute);

Doe v. Kenny, C.A. No. H-76-199 (D.Conn., Oct. 12, 1976)(consent decree)(transfers);

Bobbi Jean M. v. Wyoming Valley West School District, C.A. No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) ("right to demand that those witnesses listed appear in person at the expulsion hearing and be subject to cross-examination by the student or his attorney").

But see:

Boykins v. Fairfield Board of Education, 492 F.2d 697, 702 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (exclusions of various lengths);

Whiteside v. Kay, 446 F.Supp. 716 (W.D.La. 1978).

But cf.:

Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981).

Compare:

Ekelund v. Secretary of Commerce, 418 F.Supp. 102, 106 (E.D.N.Y. 1976) (dismissal from merchant marine academy).

Protection of Student Witnesses

One court required the opportunity to confront and cross-examine faculty witnesses but refused to require opportunity to confront and cross-examine student witnesses for fear of reprisals. Graham v. Knutzen, 351 F.Supp. 642, 665-66, 669 (D.Neb. 1972) (all suspensions). See also the order at 362 F.Supp. 881 (1973). On the other hand, the court in DeJesus v. Penberthy, supra, 344 F.Supp. at 76, found a violation of due process when a student was expelled on the basis of written statements about facts in dispute made by students who did not appear at the hearing. While the court allowed for the possibility that certain situations might justify not calling a "youthful witness," it put the burden clearly on the school:

> In a case such as this, involving expulsion, the accusing testimony should normally be taken in the presence of the plaintiff and subject to cross-examination. However, if upon a convincing showing to the Board by school authorities, the Board determines that confrontation and even cross-examination will inhibit rather than advance the search for truth, the Board may hear the witnesses (or some of them) out of the presence of the accused student, and in extreme cases, omit cross-examination by the accused student or his representative. Responsibility for probing the accusing testimony will then rest with the Board. If testimony is taken in the absence of the accused student, he must be furnished with a summary of the testimony he was not permitted to hear. Of course, the Board's conclusion to dispense with confrontation or cross-examination must be based on a good faith decision, supported by persuasive evidence, that the accusing witness will be inhibited to a significantly greater degree than would result simply from the inevitable fact that his accusations will be made known to the accused student. Such a conclusion might also be based on special circumstances concerning the accusing witness.
>
> In this case, however, there is nothing to indicate that the Board had any valid basis for dispensing with confrontation of the accusing witness or his cross-examination.

Note that the court was not permitting under any circumstances the use of testimony or statements without revealing the witness's identity and testimony to the accused student.

The New Jersey Supreme Court was even more definitive in rejecting the use of unsigned statements by student witnesses who feared retaliation in an expulsion case:

> The school community must be content to deal with threats or intimidation of the kind allegedly encountered by invoking the jurisdiction of the law enforcement authorities who must be presumed equal to their responsibilities.

Tibbs v. Board of Education, supra, 276 A.2d at 171. The court did state that cross-examination of school children witnesses should "be carefully controlled by the hearing officer or body, limited to the material essentials of the direct testimony, and not be unduly protracted." Id.

Note also that none of the other decisions granting the right to cross-examine and/or confront, cited above, created such an exception.

Right to Compulsory Process

Most courts which have recognized a right to confront and cross-examine seem to assume that this means that statements by witnesses who do not present themselves for cross-examining simply cannot be considered, and thus have not stated any constitutional duty for the school to produce adverse witnesses whose statements will not be used or to compel the attendance of witnesses favorable to the student.

In Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972), the court refused to hold that the student had a right to compulsory process. In Gonzales v. McEuen, supra, 435 F.Supp. at 468, the court stated that the school did not have a duty to produce all witnesses to an event, although it then risks the possibility of falling short of its burden of proof by not introducing sufficient testimony. Cf. Ring v. Reorganized School District No. 3, 609 S.W.2d 241, 243-44 (Mo.App. 1980) (where administration's witnesses were directed to appear, but witnesses requested by student were given the option to appear if they chose, no constitutional violation in light of student's failure to show possible injury from this and his having made no protest about their absence).

On the other hand, Mills v. Board of Education, supra, in addition to providing for confrontation and cross-examination, does give the student's parent or representative "the right to have the attendance of any public employee who may have evidence upon which the proposed action may be based." Similarly, the consent decree approved by the court in Jordan v. School District, supra, 583 F.2d at 99, provides:

> All parties or their representative shall, at Hearing II, have the right to compel the attendance of and to question any person who has given any information to the School District relevant to the proposed transfer for disciplinary reasons.

Cf: Fielder v. Board of Education, supra, 346 F.Supp. at 730 (duty on the school, not on the student, to ask persons primarily aware of the reasons for the proposed discipline to attend);
Hairston v. Drosick, supra, 423 F.Supp. at 185 (due process required for placement in special education classes would be fulfilled by implementing regulations which provide, in part, "the right to request the attendance at the hearing of any employee or agent of the county educational agency who might have testimony or evidence relevant to the needs, abilities, or status of the child");
Doe v. Kenny, supra (consent decree) (student right to "require the presence of witnesses");
Winters v. Board of Education, supra, ("The principal's cooperation in securing the presence of witnesses is essential");
Bobbi Jean M. v. Wyoming Valley West School District, supra.

5. PRESENTATION OF THE STUDENT'S CASE

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."

Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

"The opportunity to bring witnesses to appear in his behalf may also strengthen the impact of his case above the frail impressions which a written submission would make. 'Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.' Goldberg v. Kelly, 297 U.S. 254, 269 . . . (1970)."

Hagopian v. Knowlton, 470 F.2d 201, 211 (2nd Cir. 1972) (dismissal from military academy because of excess of demerits).

Goss

Goss v. Lopez provided that a student facing a short suspension must be given "an opportunity to present his side of the story." 419 U.S. 565, 583 (1975). Although the Court stopped short of requiring, countrywide, the opportunity to call witnesses in all short suspension hearings, the existence of a material factual dispute would seem to be the sort of "unusual situation" which could require such further procedures in order to insure a meaningful basis for a decision. See comments to §IX.B, "What Kind of Due Process;" and §X.A, "Suspension for Ten Days or Less." There is little reason not to hear those who have some relevant information to shed on a disciplinary situation.

Lower Court Citations

Lower courts, particularly when dealing with long-term exclusion. have uniformly upheld the student's right to present a defense. (Some of these decisions refer specifically to the right to present "witnesses or exhibits," while others just use the term "evidence.") See:

Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (expulsion) (witnesses and affidavits);
Wasson v. Trowbridge, 382 F.2d 807, 812 (2nd Cir. 1967) (dismissal from military academy) (witnesses and other evidence);
Hagopian, supra;
Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfers for from six weeks to a year) (evidence and witnesses,

"including expert medical, psychological, or educational testimony");

Esteban v. Central Missouri State College, 277 F.Supp. 649, 651 (W.D.Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970)(exclusion for two semesters) (affidavits, witnesses, and exhibits);

Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1346 (S.D.Tex. 1969)(suspension for "substantial period of time")(witnesses and other evidence);

Hobson v. Bailey, 309 F.Supp. 1393, 1402 (W.D.Tenn. 1970)(indefinite suspension)(affidavits and witnesses);

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss. 1970) (indefinite suspension)(witnesses and other evidence);

Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972)(suspension "for any considerable period of time")(evidence);

Fielder v. Board of Education, 346 F.Supp. 722, 724, 731 (D.Neb. 1972)(expulsion for remainder of year)(witnesses, documents, and own testimony);

Mills v. Board of Education of District of Columbia, 348 F.Supp. 866, 883 (D.D.C. 1972)(suspension, transfer, or other exclusion from student's normal program for more than two days)(evidence and testimony);

Corr v. Mattheis, 407 F.Supp. 847, 853 (D.R.I. 1976)(termination of federal financial aid)(evidence);

Gonzales v. McEuen, 435 F.Supp. 460, 467 (C.D.Cal. 1977)(expulsion for remainder of year)(evidence);

Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D.Mass., April 6, 1972)(any exclusions)(evidence);

Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., March 31, 1975) (Clearinghouse No. 15,369)(permanent expulsion)(witnesses);

PUSH v. Carey, C.A. Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975) (Clearinghouse No. 17,507)(suspensions potentially beyond 10 days)(witnesses, evidence), *rev'd in part on other grounds sub.nom. Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976)(reversed because of lower court's failure to award damages to students), *rev'd*, 98 S.Ct. 1942 (1978)(reversed on damages issue);

Winters v. Board of Education of City of Buffalo, C.A. No. 87-75 (W.D.N.Y. 5/25/78)(Stipulation for Entry of Judgment and Judgment)(suspension beyond five days)(witnesses and other evidence);

DePrima v. Columbia-Green Community College, 392 N.Y.S.2d 348 (N.Y.Sup.Ct., Albany County, 1977)(disciplinary probation) (witnesses);

North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977) (expulsion)(evidence);

Cf: *Hairston v. Drosick*, 423 F.Supp. 180, 185 (S.D.W.Va. 1976)(due process required for placement in special classes would be met by implementing regulations providing, in part, "that the parties have an opportunity to present their evidence and testimony");

Doe v. Kenny, C.A. No. H-76-199 (D.Conn., Oct. 12, 1976) (Clearinghouse No. 19,358) (consent decree) (disciplinary transfers) (right to testify, present witnesses and other evidence);

Bobbi Jean M. v. Wyoming Valley West School District, C.A.No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days) (testify and produce witnesses).

But see:

Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (no due process violation where teacher witnesses called by students had to obtain principal's permission and student witnesses had to obtain parent's permission; no showing that any student was ever denied the presence of a necessary witness).

In Bright v. Los Angeles Unified School District, 124 Cal.Rptr. 598 (App.Ct. 1975), the court held that the banning of an underground newspaper violated the right to due process where the principal decided that an article was libelous solely on the basis of assurances by school administrators and did not extend his inquiry as to the truth or falsity of the article to more disinterested sources.

In Wasson v. Trowbridge, supra, the court stated that the students must be allotted adequate time at the hearing to present their defense.

Compulsory Process

Compulsory process, under which witnesses are required to appear if requested, and similar models in which the school helps to obtain the presence of requested witnesses, can be helpful when a witness with favorable testimony is either reluctant to testify or is difficult to locate. The case law on compulsory process is discussed in §XI.F.4 "Adverse Witnesses and Evidence."

Who Goes First?

The case against the student should be presented before the student has to present his/her case. This is consistent with the presumption of the student's innocence, and the student should be able to respond to the specific case against him/her, rather than having to mount a general defense against undetermined evidence. [See Goss v. Lopez, supra, 419 U.S. at 581 ("notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story").] In fact, if sufficient evidence is not presented to establish the student's wrongdoing, the student should be found innocent without having to present any evidence. See:

§XI.F.6, "Privilege Against Self-Incrimination;"
§XI.F.7, "Burden of Proof, Presumption of Innocence;"
§XI.G.1, "Findings: Determination of Misconduct."

See especially In re DeVore, 11 Ed.Dept.Rep. 296 (N.Y.S.Ed.Comm'r 1972), quoted at length in §XI.F.7, where a hearing in which the student was required to come forward first was overturned on all these grounds.

6. PRIVILEGE AGAINST SELF-INCRIMINATION

"No person... shall be compelled in any criminal case to be a witness against himself..."

United States Constitution, Amendment V.

"The privilege against self-incrimination... reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemna of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' ...; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' ...; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

Murphy v. Waterfront Commission, 378 U.S. 52,55 (1964); quoted with approval in Andressen v. Maryland, 96 S.Ct. 2737, 2746 n.8 [illegible]976).

"' * * * the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of defendant in a criminal action to request to be a witness shall not create any presumption against him.' [quoting from Wilson v. United States] 149 U.S., [60] p.66, [13 S.Ct. 765, 766, 37 L.Ed. 650].

"If the words 'Fifth Amendment' are substituted for 'act' and for 'statute', the spirit of the Self-Incrimination Clause is reflected. For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,'... which the Fifth Amendment outlaws."

Griffin v. California, 380 U.S. 609, 613-14 (1965).

"The privilege against self-incrimination is, of course, related to the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper... One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

"It would indeed by surprising if the privilege against self-incrimination were available to hardened criminals but not children... As Mr. Justice White, concurring, stated in Murphy v. Waterfront Commission, 378 U.S. 52, 96... (1964):

> 'The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory * * * it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used*.'(Empahsis added [by the Court].)

"Against the application to juveniles of the right to silence, it is argued that juvenile preceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any *criminal case* to be a witness against himself.' [Emphasis added by Court.] However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or adminstrative proceeding, if the statement is or may be inculpatory.

"It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'deliquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination... And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty -- a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

"In addition, ... there is little or no assurance... that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside the reach of adult courts as a consequence of the offense for which he has been taken into custody. ...

"... In light of the observations of Wheeler and Cottrell, and others, it seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse -- the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

"Further authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

In re Gault, 387 U.S. 1, 47-50 (1967).

"This Court has been asked to rule on the question of whether the refusal of a student to testify before a school board in a matter involving charges against him for violation of Policy 5131 [possession of marijuana] can be used against him as an admission of guilt.

"This Court holds that one cannot be denied his Fifth Amendment right to remain silent merely because he is a student. Further, his silence shall under no circumstances be used against him as an admission of guilt.

"... The considerations of age must also be weighted, with greater protections being afforded children due to their youth."

Caldwell v. Cannady, 340 F. Supp. 835, 840-41 (N.D.Tex. 1972) (expulsion for remainder of semester).

Legal Bases for Applying the Privilege in Schools

Gault makes it clear that a person may exercise the Fifth Amendment right to remain silent in an administrative proceeding (such as a school disciplinary proceeding), where he/she reasonably believes that his/her testimony might be used against him/her in a later criminal or juvenile proceeding. This is one basis for explaining the holding in Caldwell This doctrine has also been applied by the Supreme Court to other administrative proceedings. See, for example:

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (commission hearing);
Spevack v. Klein, 385 U.S. 511 (1967) (disbarment proceedings);
Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977).

Independently, the Fifth Amendment will apply if the proceedings themselves, although nominally civil or administrative, are basically equivalent to, or as severe as, criminal proceedings, as in Gault. See

Gonzalez v. McEuen, 435 F.Supp. 460, 470-71 (C.D.Cal. 1977), where the court followed Caldwell and held that the privilege applied in a school disciplinary hearing for misconduct (which apparently was not going to lead to later criminal proceedings), stating, "There is no question that a high school student who is punished by expulsion [for remainder of year] might well suffer more injury than one convicted of a criminal offense."

Finally, the use of an accused student's compelled testimony, if seen to deny fundamental fairness or to create too large a risk of untrustworthiness, may be a violation of the Due Process Clause even in situations where the Fifth Amendment itself is not applicable.

Goldwyn v. Allen, 54 Misc.2d 94, 281 N.Y.S.2d 899 (N.Y.Sup.Ct. 1967) (withdrawal of New York State Regents Examination privileges for one year based on student's confession of cheating, which was later recanted).

Cf: Gonzales v. McEuen, supra.

But cf.:

Buttny v. Smiley, 281 F. Supp. 280, 287 (D.Colo. 1968) (suspension) (university not required to inform student of his right to remain silent).

Implications of the Privilege -- Silence Not Basis for Punishment

The Fifth Amendment protects against being compelled to testify against oneself. If the government imposes a serious penalty for refusal to testify, then it has introduced a form of compulsion. Thus, several decisions have held that, in situations in which a person has a right to exercise a Fifth Amendment privilege, exercising that privilege and remaining silent cannot be a basis for punishment or be taken as an admission of guilt in the administrative proceeding.

Murphy, supra;
Spevack, supra;
Lefkowitz, supra;
Caldwell, supra;
Gonzales, supra, ("The court holds that comment by counsel on the students' refusal to testify, and arguments that guilt could be inferred from such refusal was a violation of the students Fifth Amendment rights");
In re DeVore, 11 Ed.Dept.Rep. 296 (N.Y.S.Ed.Comm'r 1972) (quoted at length in §XI.F.7, "Burden of Proof, Presumption of Innocence") (indefinite suspension overturned where superintendent based his decision on student's choosing to remain silent; violation of school's obligation to come forward with sufficient evidence and of student's right to a presumption of innocence).

In Morale v. Grigel, 422 F.Supp. 988, 1003 (D.N.H. 1976), the court reached a different result concerning a semester suspension in which the student's silence was taken as one factor pointing toward guilt. The court, relying on Baxter v. Palmigiano, 425 U.S. 308 (1976) (use of prisoner's silence as one piece of evidence in prison disciplinary proceeding), stated that, where the student was not a criminal defendant and the state was not using his silence at the disciplinary hearing in any criminal proceeding, and the silence "was given no more evidentiary value than was warranted by the facts surrounding his case," it was not illegal to use the silence as one factor along with the other evidence. However, in Suzuki v. Yuen, 438 F.Supp. 1106, 1111-12 (D.Haw. 1977), the court held that the privilege extends to proceedings for temporary civil psychiatric commitments and that it is unconstitutional to base such temporary hospitalization on refusal to participate in a psychiatric examination conducted for the purpose of determining whether or not he/she should be committed, distinguishing Baxter v. Palmigiano:

> In Baxter, an inmate's silence is used for its evidentiary value in disciplinary proceedings. In the instant case, one's silence is not used for evidentiary purposes, but is used as a justification for hospitalization when there is otherwise insufficient evidence for commitment.

Compare Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978), where a student was faced with having to decide whether to testify at his disciplinary hearing, which occurred while criminal charges were pending concerning the same incident. The court held that, if the student testified, the Fifth Amendment would not bar the later use of his testimony in the criminal proceedings because he was not being "compelled" to testify at the disciplinary hearing. The court reached this conclusion only after determining that the university's policies guaranteed that the decision would be based only on the evidence presented even if the student remained silent, and that there was no evidence that the hearing panel would give weight to his remaining silent. The court did hold that the student had the right to counsel to help him make the decision. See also Adibi-Sadeh v. Bee County College, 454 F.Supp. 552 (S.D.Tex 1978) (court found that sufficient evidence of guilt had been presented at hearings and that therefore students were not punished for exercising right to remain silent because of pending criminal charges).

The issues here are connected to the requirement that the burden of proof be placed on the school and that the student not be punished unless sufficient evidence has been introduced to conclude that s/he is guilty. See §XI.F.7 (including In re DeVore), and §XI.G.1.

Related Issue -- Student Interrogation Outside of Hearings

Issues of self-incrimination and privilege are not limited to questioning at the hearing itself. They can extend to questioning at other times by school officials and by police. See:

§IV.C, "Police in Schools;"
§IV.E, "Collection of Information About Students;"
§IV.G, "Privileged Communications."

7. BURDEN OF PROOF, PRESUMPTION OF INNOCENCE

"Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension."

Mills v. Board of Education, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days).

"Raymond DeVore was indefinitely suspended from school... The basis for he suspension was the fact that Raymond DeVore had been 'arrested' for an alleged offense involving possession of dangerous drugs. A hearing was offered the student by the superintendent, but no charges were filed or served. Futher, no evidence was introduced by the school officials at the hearing. The decision to suspend was made solely on the basis of the arrest and upon the student's refusal to answer Superintendent Friot's question as to whether he had ever possessed drugs in school. The student refused to answer questions on possible drug use based upon his counsel's warning that he had a right not to answer questions which might incriminate him both in the administrative proceeding and at a possible subsequent criminal trial.

"It is apparent from a reading of the transcript that the superintendent of schools misconceived his role as a hearing officer under Education Law §3214(3)(c). This misconception is best characterized in the following colloquy between the superintendent and petitioner's counsel.

> Mr. Manak: Now at a hearing ordinarily the burden is on the school to go forward with some evidence.
>
> Dr. Friot: Well, now this is not a prosecution. This is a hearing. The law says you are entitled to be heard. You now have your opportunity to be heard. So?

"Section 3214(3)(c) requires that a student be given an opportunity for a full evidentiary hearing before he may be suspended from shcool for more than five days. Although the proceeding is administrative, it is nevertheless an adversary proceeding, and the responsibility for establishing that the student is guilty of misconduct rests with the complaining school officials. In Matter of Port (9 Ed Dept Rep 107 (1970), I noted:

> Before a pupil may be disciplined, whether it be by expulsion, suspension or curtailment of privileges, two essential elements must be present. There must be some conduct which serves as the predicate for the imposition of discipline and there must be a reasonable degree of certainty that the pupil was the perpetrator of, or otherwise participated in, such conduct.

"It is clear that the responsibility for establishing both elements in a disciplinary situation rests with the school officials. It is equally well settled that the student must be afforded the basic presumption of innocence of wrongdoing until his guilt has been established by direct, competent evidence of misconduct (Matter of Rodriguez, 8 Ed.Dept.Rep. 214 (1969); Matter of Rose, 10 id. 4 (1970); Matter of Montero, 10 id. 49 (1970); Matter of Watson, 10 id. 90 (1971)."

In re DeVore , 11 Ed.Dept.Rep. 296, 296-97
(N.Y.S.Ed.Comm'r 1972).

Mills, DeVore, and the cases cited therein are among the few cases to address the issue of presumption of innocence explicitly. See also Matter of Chitty, 12 Ed.Dept.Rep. 282 (1973). Nevertheless, all the cases dealing with the degree of evidence necessary (see §XI.G.1. "Determination of Misconduct") implicitly assume that the burden is on those who are accusing the student, despite the differences as to the degree of that burden. Note also, "The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education." Dixon v. Alabama State Board of Education, 294.F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (emphasis added). In St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974), which held that students were wrongfully punished for the misconduct of their parent, the court stated.

> Freedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification. [Emphasis in original.]

In Giles v. Redfern, C.A. No._____ (N.H. Super. Ct., Cheshire County, Jan. 18, 1977) (Clearinghouse No. 20,624) (suspension for remainder the court found a denial of due process, in part because the Dean resolved a conflict in the hearing testimony between the accused student version and a student security officer's version by relying on "the principle of the prima facie nature of the testimony of a law (security) officer." The court noted, "While this 'principle' has wide currency in many totalitarian countries, the court is not aware of its existence as a principle of Anglo-Saxon law."

As the opinion in DeVore demonstrates, the fact that the burden of proving guilt rests upon the person presenting the case against the student and that the student is presumed innocent is related to certain other procedural requirements. First, the presumption of innocence allows the student to remain silent if he/she chooses, by maintaining the requirement that the school must still submit sufficient evidence of guilt. See §XI.F.6, "Privilege Against Self-Incrimination;" and §XI.G.1, "Determination of Misconduct." Second, placing of the burden in this manner should mean that the person presenting the case against the student should come forward first. See "Who Goes First?" in §XI.F.5, "Presentation of the Student's Case." The case should be dismissed at that point, without the student having to present evidence of innocence, if sufficient evidence against the student has not been presented.

8. RULES OF EVIDENCE

"Plaintiffs and their counsel. . . may object to the admission of any testimony or evidence."

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss.1970)(indefinite suspension).

a. GENERAL STANDARD FOR ADMISSION OF EVIDENCE

"Agencies may admit any relevant evidence, except that they shall observe the rules of privilege recognized by law. A finding may be supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs, whether or not the evidence would be admissable before a jury. Agencies may exclude evidence which is irrelevant, cumulative, or lacking in substantial probative effect."

Kenneth Culp Davis, Administrative Law Treatise, §14.06 (1958).

The formulation in Davis is often cited as a standard for hearings before administrative agencies. See, for example, the Massachusetts Administrative Procedure Act, M.G.L. Chapter 30A, §11(2). It eliminates the need for hearing officers to become experts in, for example, all the facets of the hearsay rule and its exceptions.

Nevertheless, the right of confrontation generally prohibits school disciplinary tribunals from considering statements against the student made by witnesses who are not present at the hearing for questioning by the student/parent. See cases cited in §XI.F.4, "Adverse Witnesses and Evidence."

b. HEARING CONFINED TO THE CHARGES

Allowing the consideration of evidence unrelated to the charges in the notice would violate the student's legal right to adequate notice of the charges and an opportunity to defend against them. See the cases cited in §XI.B , "Notice." See also DeJesus v. Penberthy, 344 F.Supp. 70, 76-77 (D.Conn. 1972), where an expulsion was overturned because the school board considered evidence on a charge which was different from that contained in the notice and which might have been the basis for the school board's decision. Finally, as discussed in §XI.G.1, "Determination of Misconduct," the findings must be confined to the charges contained in the notice, and this requirement would be threatened by the admission of evidence which did not relate to those charges.

c. EXCLUSION OF IMPROPERLY ACQUIRED EVIDENCE

"The combined effect of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) and Coolidge v. New Hampshire, 403 U.S. 443 (1971) prohibits the consideration by a school board of evidence obtained in violation of Fourth Amendment rights."

Caldwell v. Cannady, 340 F.Supp. 835, 839
(N.D.Tex. 1972).

"The final problem is whether an exclusionary rule applies in this case. . . . The court might hold that the evidence seized from Smith's room by the College authorities, although seized in violation of his constitutional right of privacy, was admissable in the College disciplinary hearing whether or not it would be admissable in a formal criminal proceeding.

"In Weeks [v. U.S., 232 U.S. 383 (1914)], the Supreme Court for the first time held that the Fourth Amendment barred the use of evidence secured in a federal prosecution. In Mapp v. Ohio, 367 U.S. 643. . . (1961) the court held that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissable in a state court.

"In Mapp, the Court emphasized that 'the purpose of the exclusionary rule "is to deter -- to compel respect for the constitutional guaranty in the only effective available way -- by removing the initiative to disregard it." Elkins v. United States, supra, 364 U.S. [206] at page 217 . . . (1960).' 367 U.S. at 656 . . . In United States v. Calandra, supra, the Court stated that the exclusionary 'rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' 414 U.S. at 348 . . . . To determine whether the exclusionary rule applies in a given case, it is necessary to weigh the injury to governmental interests and institutions against the potential benefits of the application of the rule. Id at 349 . . . . In Calandra, the Court determined that illegally seized evidence could be used as a basis for grand jury questions. The fact that the prosecution could not use illegally obtained evidence at a criminal trial was deemed to be a deterrent to illegal police conduct, and the exclusion of the evidence or the fruits thereof from a grand jury proceeding was deemed to have no significant deterrent effect.

"If there were no exclusionary rule in this case, the College authorities would have no incentive to respect the privacy of its students. Students do not normally have the means to maintain a protracted damage action. In addition, those whose rights are violated cannot recover damages except from those who acted in bad faith [i.e. who knew or should have known that such actions were illegal]. See Wood v. Strickland, 420 U.S. 308 . . . (1975). Where, as here, the authorities who violated the Constitution were not demonstrably guilty of bad faith, the exclusionary rule remains the only possible deterrent, the only effective way to positively encourage respect for the constitutional guarantee. This conclusion is consistent with, and perhaps required by, Calandra, supra, which was premised upon the availability of an exclusionary rule applicable to the authorities' case in chief, as well as the genuine possibility of recovery in a damage action.

"In One 1958 Plymouth Sedan [v. Cmwlth. Pennsylvania, 380 U.S. 693 (1965)], the Supreme Court held the exclusionary rule applicable to a "quasi-criminal' forfeiture proceeding, observing, 'It would be anomalous indeed. . .to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissable. [Footnote omitted.] That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts.' 380 U.S. at 701 . . . . In this case, the court has found that Smith is in the same position as a criminal defendant; proof that the college regulation has been violated requires proof that the criminal law has been violated; and the punishment in fact imposed by the College is more severe than that likely to be imposed by any state or federal court for the same offense. It would thus be anomalous here, too, not to apply the exclusionary rule.

"The application of an exclusionary rule to College disciplinary hearings where the College authorities have seized evidence in violation of Fourth Amendment rights will preserve the integrity and thus the legitimacy of the College as the maker and enforcer of regulations. Institutions which enforce the law should not infringe upon fundamental constitutional rights in doing so. As Mr. Justice Brandeis said, '_Our government is the potent, omnipresent teacher_ . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' Olmstead v. United States, 277 U.S. 438, 485 . . . (1928). (Emphasis added [by the court].) If all Government is an omnipresent teacher, so also most certainly and more immediately is a College in relation to its students. In part for this reason, '_[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools_.' Shelton v. Tucker, 364 U.S. 479, 487 . . . (1960). (Emphasis added [by the court].)

"The court concludes that the evidence seized in the illegal search of Smith's room could not be used against him in the College disciplinary proceedings. Accordingly, the College must retry him, without the evidence, or dismiss the charges."

Smyth v. Lubbers, 398 F.Supp. 777, 793-95
(W.D.Mich. 1975)

The same result was reached in Jones v. Latexo Independent School District, 499 F.Supp. 223, 237-39 (E.D.Tex. 1980), where the court found that the results of school officials' unconstitutional search of students must be excluded from their school disciplinary proceedings in order to serve as a deterrent to such illegal conduct. Because all the evidence against the students resulted from the search, their suspensions and subsequent grade reductions were overturned.

Contrary results have been reached in:

Ekelund v. Secretary of Commerce, 418 F.Supp. 102, 106 (E.D.N.Y. 1976) (dismissal from merchant marine academy);
Morale v. Grigel, 422 F.Supp. 988, 999-1001 (D.N.H. 1976) (suspension for semester).
Cf.: State v. Young, 216 S.E.2d 586 (Ga. 1975) (criminal conviction, exclusionary rule applies only to searches by law enforcement officers and not to searches by school officials);
Commonwealth v. Dingfelt, 227 Pa.Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974) (similar holding).

Contrast Young with State v. Mora, 307 So.2d 317 (La. 1975), where the court held that the exclusionary rule does apply to the use in a criminal proceeding of evidence obtained in a search by school officials.

See: People v. D., 315 N.E. 2d 466, 469 (N.Y. 1974) (teacher's search of student without sufficient cause required suppression of evidence in youthful offender proceedings);
In the Interest of L.L., 280 N.W.2d 343, 346-47 (Wis.App. 1979) (exclusionary rule applies to search by teacher when evidence is used in juvenile delinquency proceedings).
Cf.: State v. Walker, 528 P.2d 113 (Ore.App. 1974) (statement similar to Mora);
Waters v. U.S., 311 A.2d 835 (D.C.Ct.App. 1973) (excluding use in criminal trial of evidence obtained in search by police officer working in concert with school official);
State v. Trippe, 246 S.E.2d 122 (Ga.App. 1978) (excluding from criminal prosecution evidence obtained by school's chief security officer, who was also deputized by county, in search requested by the school's dean; State v. Young distinguished on on grounds that the search was conducted by law enforcement officer);

Savina Home Industries, Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979) (application of exclusionary rule to administrative proceedings stemming from occupational health and safety search).

Ekelund and Morale rely in part on United States v. Janis, 96 S.Ct. 3021 (1976), where the Court held that the exclusionary rule would not be extended to forbid the use in the civil proceeding of one sovereign (here a tax proceeding by the federal government) of evidence seized by a criminal law enforcement agent of another sovereign (here the state government), where the latter acted in good faith reliance on a warrant (later proved defective) in conducting the seizure and there was no showing that the former participated in the illegality. This holding, which Jones carefully distinguishes, was based largely on the conclusion that exclusion in such circumstances would have little deterrent effect. It does not, thus, speak directly to use in a school disciplinary hearing of evidence improperly obtained by school officials, or of evidence improperly obtained by local police officials who have a cooperative relationship with school officials and are agents of the same sovereign. In either of these cases, as the reasoning in Smyth and Jones would indicate, the valuable, deterrent effect of an exclusionary rule would be quite strong. See Savina Home Industries, supra.

For standards for determining whether the search was improper in the first place, see §IV.B, "Search and Seizure."

d. EXCLUSION OF PRIVILEGED COMMUNICATIONS

See §IV.G, "Privileged Communications."

9. RECORDING THE HEARING

The right of appeal (or judicial review) will often be meaningless if there is no accurate way for the appeals body (or a court) to review the proceedings. There are a variety of approaches:

1. Does the school record the proceedings, or is the student merely given the right to do so?
2. Is the school's recording made automatically or only upon the student's request?
3. Does the school make a written transcript, or does it simply maintain a record in some form, such as a tape recording?
4. If there is no written transcript, will the school provide a written summary of testimony from the tape?
5. Is a copy of the tape or transcript provided to the student without charge, or for payment of a fee, or is the original simply made available to the student for inspection (with, perhaps, the right to make his/her own copy from it at his/her expense)?

Student's Right to Make a Recording

The student's right to make a recording of the hearing has been recognized in:

Esteban v. Central Missouri State College, 277 F.Supp. 649, 652 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (exclusion for two semesters);
Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) (suspension or expulsion);
Givens v. Poe, 346 F.Supp. 202, 209, (W.D.N.C. 1972) (suspension "for any substantial period of time");
Quintanilla v. Carey, C.A. No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse No. 15,369) (permanent expulsion);
PUSH v. Carey, C.A.Nos. 73-C-2522, 74-C-303 (N.D.Ill., Nov. 5, 1975) (Clearinghouse No. 17,507) (suspensions potentially beyond 10 days), rev'd in part on other grounds sub nom. Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976) (reversed because of lower court's failure to award damages to students), rev'd on other grounds, 98 S.Ct. 1042 (1978) (reversed on damages issue).

School's Obligation to Make Record

The school's obligation to record the proceedings has been recognized in:

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfers for from six weeks to one year) ("A stenographic, transcribed or taped record of both Hearing I and Hearing II shall be made and shall be available to the parent or guardian and student or his/her representative. Said record must be retained intact by the School District for a period of not less than three (3) years");

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss. 1970) (suspensions) ("Proceedings at the hearing shall be transcribed at the expense of the University and a copy shall be furnished the Court and opposing counsel");

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from basketball practices for remainder of season) ("proceedings should be recorded, and the tapes should be made available to plaintiffs in the event they wish to appeal");

Marin v. University of Puerto Rico, 377 F.Supp. 613 (D.P.R. 1974) (suspension for over a year) ("the proceedings of which are transcribed");

Mills v. Board of Education, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days) ("A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative");

Anderson v. Seckels, C.A. No. 75-65-2 (S.D.Ia., Magistrate's Memorandum and Opinion, Dec. 20, 1976) (Clearinghouse No. 21,627C) ("transcript or recording of the proceedings");

North v. West Virginia Board of Regents, 223 S.E. 2d 411 (W.Va. 1977) (expulsion) (right to "an adequate record of the proceedings").

See: Fielder v. Board of Education, 346 F.Supp. 722 724, 731 (D.Neb. 1972) (expulsion for remainder of year) ("Delivery to the student or his counsel of . . . Such verbatim record of the hearing as such student may elect to have at his own expense or the school board may elect to have at its own expense").

Cf.: Doe v. Kenny, C.A. No. H-76-199 (D.Conn., Oct. 12, 1976) (Clearinghouse No. 19,358) (consent decree) (disciplinary transfers) ("Oral proceedings or any part thereon shall be transcribed on request of any party. The requesting party shall pay accordingly, the cost of such transcript or part thereof.");

Bobbi Jean M. v. Wyoming Valley West School District C.A.No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree) (exclusion beyond ten days) (school required to keep record, parent entitled to copy of the transcript at own expense).

Contra:

Due v. Florida Agric. and Mech. University, 233 F.Supp. 396, 403 (N.D.Fla. 1963) (Judge Carswell) (indefinite suspension).

Compare:

Navato v. Sletten, 560 F.2d 340 (8th Cir. 1977) (denial of certificate of completion of residency program) (tape recording was sufficient, stenographic record not required);

Morale v. Grigel, 422 F.Supp. 988 (D.N.H. 1976) (one-term suspension) (failure to make a record of the initial hearing not a violation of due process here, since the appeal hearing was de novo).

See also cases which have held that New York Education Law, Sec. 3214, which calls for a "record. . . . but no stenographic transcript shall be required," requires a complete, verbatim record, and not just a summary or incomplete record.

Ross v. Disare, 500 F. Supp. 928, 933 (S.D. N.Y. 1977)
(Clearinghouse No.21,649)(suspension beyond 5 days);
Matter of Rose, 10 Ed.Dept.Rep. 4 (N.Y.Ed.Comm'r 1970);
Matter of Grandal, 11 Ed.Dept.Rep. 144 (1972);
Matter of Corbett, 12 Ed.Dept.Rep. 184 (1973).

G. FINDINGS

1. DETERMINATION OF MISCONDUCT

Separate Determinations: Misconduct and Sanction

"Although the procedures in the simple suspension are relatively informal it cannot be emphasized too strongly that the entire thrust of the requirement is to insure that there is a genuine fact-finding process which is a 'meaningful hedge' against erroneous action. This being the case it would seem that three common practices of school officials are now implicitly prohibited. . . .

"Third, there must now be a fact-finding determination which precedes a determination about what to do about the child. Commonly these concerns get mixed up and the determination of whether the student was guilty of the act charged gets lost in the process. A determination of guilt for a specified offense is, under Goss, a prerequisite for a suspension. This prerequisite must be met before school officials can properly determine if a suspension or some other alternative is in the 'best interests' of the child."

Peter Roos, "Goss and Wood: Due Process
and Student Discipline," 20 Inequality in
Education 42, 43-44 (1975).

In Mills v. Board of Education, 348 F. Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days), the court stated,

> No finding that disciplinary action is warranted shall be made unless the Hearing Officer first finds, by clear and convincing evidence, that the child committed a prohibited act upon which the proposed disciplinary action is based. After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings.

An argument can be made that the hearing tribunal should first hold a hearing on the issue of misconduct and then, if it finds misconduct, reconvene before the student and other relevant parties to consider the issue of a penalty. At that time, the student could make any mitigating arguments, and the student's past record, good and bad, could be entered into evidence and considered by the tribunal. The determination of what actually happened in this case would then not be tainted by generally irrelevant information about other cases, while still allowing that information to serve a helpful role in determining an appropriate disciplinary action. Unless the hearing process is separated out in this manner, it is difficult to see how else the student can be assured of his/her rights to:

(a) a hearing confined to the scope of the charges (see §XI.F.8.b);
(b) findings confined to the initial charges (see below).

Several New York decisions have held that the student's anecdotal record cannot be introduced into evidence until after there has been a determination of guilt. See, for example:

Matter of Watson, 10 Ed. Dept. Rep. 90 (N.Y.Ed.Comm'r 1971);
Matter of Anderson, 11 Ed. Dept. Rep. 45, 47 (1972);
Matter of Grandal, 11 Ed. Dept. Rep. 144, 146 (1972).

For more on the requirement that there must be some proof of guilt, see §XI.F.7, "Burden of Proof, Presumption of Innocence." Cf. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

Standard of Proof (Clear and Convincing Evidence?)

"It is in light of the high stakes involved [two-year suspension for possession of drugs] that the Court must determine whether a standard of proof is required by the Due Process Clause, and if so, whether the 'substantial evidence' standard is constitutionally adequate. The court concludes that at least where an adult student is charged by a College with committing an act which is a crime, the Due Process Clause requires that some articulated and coherent standard of proof be formally adopted and applied at the college hearing which determines the student's guilt or innocence of the charge. If such a standard is not adopted and applied, then the college hearing board is totally free to exercise its prejudices or to convict for the purpose of vindicating 'order and discipline' rather than on the evidence presented. All the rest of the procedural guarantees become or threaten to become meaningless as even a well-intentioned hearing board is adrift in uncertainty over the measure of persuasion to be applied. That there be an articulated and coherent standard of proof is all the more crucial to fundamental fairness where, as in the college context, there are few constitutional or practical limitations on the nature of evidence which may be admitted against the accused. . .

"The first problem with the 'substantial evidence' standard is that it is, standing alone, primarily a formula intended for appellate review of trial courts' determinations or judicial review of administrative determinations. Trial courts and administrative agencies have functions different from appellate and reviewing courts. Trial courts and administrative agencies have the original task of resolving conflicts in the evidence and between opposing interpretations. An appellate or reviewing court, in contrast, has the task of determining only whether the trial court or administrative body had a rational basis for its decision. The appellate or reviewing court does not conduct a trial de novo and resolve conflicting views a second time. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 . . . (1951). A standard appropriate for a reviewing court to apply to determine whether there is a minimal rational basis for decision is not appropriate for an original trier of fact to resolve conflicts in the evidence and between opposing interpretations. The issue before the trier of fact is not whether there is a minimal basis for conviction or whether a conviction would survive appeal or collateral attack. See Jaffe, 'Administrative Law: Burden of Proof and Scope of Review,' 79 Harv.L.Rev. 914, 915 (1966).

"The substantial evidence formula standing alone as a standard of proof for the trial court provides no measure of persuasion or degree of proof to guide the court in resolving conflicts to reach its ultimate decisions, but goes only to the quantity of evidence required by the prosecutor. Cf. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 281-84 . . . (1966). Under the College's rule, the College need only present a certain quantum of evidence (substantial) that a party was guilty as charged, and the All College Judiciary could convict, regardless of what else appeared in evidence . . . . It may be that in other contexts a 'substantial evidence' rule implies a 'preponderence of of the evidence' standard of proof which is understood and applied by trained hearing officers and expert administrative agencies, 5 U.S.C. Sec. 556(d); Woody, supra, 385 U.S. at 288 & n. 1, . . . (Clark, J., dissenting), but the court cannot assume that this lay Judiciary knew or understood or applied the principle. . . .

"'Substantial evidence' has been defined as enough evidence 'to justify, if the trial were to a jury, a refusal to direct a verdict,' N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 . . . (1939). Assuming this definition embodies an intelligible standard of proof for a trier of fact, that standard is too low. The application of any standard lower than a 'preponderence of evidence' would have the effect of requiring the accused to prove his innocence. Under the circumstances of this case, at least, it would be fundamentally unfair to shift the burden of proof to the accused.

"The Court concludes that the College's 'Due Process' Rule 14 in the 1973-74 Student Handbook which states, 'No disciplinary action shall be taken on grounds which are not supported by substantial evidence' is constitutionally inadequate as a standard of proof because it provides no intelligible standard of proof to guide the All College Judiciary, or because, to the extent that it might embody an intelligible standard, that standard is totally one-sided and is lower than that constitutionally required. . . .

"The court need not and does not reach the question of precisely what standard of proof would be constitutionally adequate under the circumstances of this case. The court is certain that the standard cannot be lower than 'preponderence of the evidence.' However, given the nature of the charges and the serious consequences of conviction, the court believes the higher standard of 'clear and convincing evidence' may be required.[15] The 'clear and convincing' standard is well below the criminal standard which the College hearing officer thought would be the 'fairest' to apply in these cases ['proof beyond a reasonable doubt']. The 'clear and convincing' standard would be consistent with the general proposition that 'school regulations are not to be measured by the standards which prevail . . . for criminal procedure,' Esteban, supra, 415 F.2d. at 1090, and would not be so strict a requirement as to cripple the disciplinary process. Cf., Goss, supra, 419 U.S. at 580 . . . . The court recommends that the College give serious consideration to adopting the 'clear and convincing' standard for future cases.

> "15. In Woodby, supra, the Supreme Court held that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as ground for the deportation are true. In the case of In re Winship, 397 U.S. 358... (1970), the Supreme Court held that proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage of a juvenile delinguency proceeding when a juvenile is charged with an act which would constitute a crime if committed by an adult. Although the juvenile's physical liberty was at stake, the Court emphasized also the element of stigma which attaches upon conviction. Id. at 363-364 . . . ."

Smyth v. Lubbers, 398 F.Supp. 777, 797-99
(W.D. Mich. 1975)

As the court stated in a footnote, 398 F.Supp. at 798 n.13, the many cases previous to Smyth which refer to "substantial evidence" as a requirement of due process were "stating the rule on appeal. None was stating an original standard of proof. . . ."

The "clear and convincing evidence" standard was also required by Mills v. Board of Education, supra. Cf. Gonzales v. McEuen, 435 F.Supp. 460, 466 (C.D.Cal. 1977) (expulsion for remainder of year), where the court, after finding that the school board's hearing had been procedurally inadequate, stated that it, the court, would use the "standard of 'clear and convincing' proof" to weigh the evidence itself, rather than limiting the scope of judicial review to "substantial evidence" as in the "ordinary case."

For comparison with the use of the "substantial evidence" standard generally appropriate for review on appeal, see § XI.H.

For purposes of insuring that the hearing panel bases its findings upon clear and convincing evidence, it may be helpful to insist that this basis be included in the written findings. See comments to §XI.G.3, "Issuance of Findings."

Findings Based Solely Upon the Evidence Presented at the Hearing

Reasons for requiring that the decision be based solely upon evidence presented at the hearing are stated in Matter of DeVore, 11 Ed. Dept. Rep. 296 (N.Y.Ed.Comm'r 1972) (indefinite suspension based upon arrest for alleged drug possession):

The superintendent chose, however, to rely upon his personal knowledge of the fact of arrest and the basis for the arrest. It is evident from a reading of the transcript that he utilized such personal knowledge as an alternative to testimony. There are, of course, three essential defects in this procedure.

First, a decision to impose a disciplinary penalty and the extent of the penalty must be supported by the evidence contained in the record. This cannot be the case where the fact of arrest is established solely from the private knowledge of the hearing officer. Secondly, it is impossible for the student to cross-examine or in any way rebut the private, nontestimonial knowledge of the hearing officer. Third, and perhaps must serious, is the fact that the hearing officer loses his neutral posture and, in effect, becomes a salient witness in support of the charges. Nothing is more essential than a neutral hearing officer (Matter of Dishaw, 10 Ed.Dept.Rep. 34 (1970).

This requirement of findings based solely upon evidence presented at the hearing has been articulated by several other courts. See, for example:

Esteban v. Central Missouri State College, 277 F.Supp. 649, 652 (W.D.Mo. 1967), approved in 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (exclusion for two semesters);

Marzette v. McPhee, 294 F.Supp. 562 (W.D.Wis. 1968) (suspension or expulsion);

DeJesus v. Penberthy, 344 F.Supp. 70 (D.Conn. 1972) (expulsion);

Fielder v. Board of Education, 346 F.Supp. 722, 731 n.7 (D.Neb. 1972) (expulsion for remainder of year);

Mills v. Board of Education, supra, 348 F.Supp. at 882;

Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D.Mass., Apr. 6, 1972)(all exclusions).

See: Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (required in welfare hearings).

Cf.: Hairston v. Drosick, 423 F.Supp. 180, 184 (S.D.W.Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which include this requirement).

But Cf.:

Morale v. Grigel, 422 F.Supp. 988, 1004 (D.N.H. 1976) (one-term suspension) (possible consideration of other information harmless error here, since there was independent evidence at hearing).

Here again, requiring that the written findings specify the evidence relied upon will help to insure that this requirement is met. Fielder, supra. See comments to §XI.G.3.

Findings Tied to Guilt of Initial, Specific Charges

The reasons for requiring that there be a finding that the student is guilty of the initial charges are much the same as the reasons for requiring that the findings be based solely upon evidence presented at the hearing -- any other basis for decision would destroy the student's opportunity to present a defense to the charges.

This has been recognized, for example, in:

Strickland v. Inlow, 519 F.2d 744, 747 (8th Cir. 1975) (students' "opportunity to present their side of the case was rendered meaningless" by decision based upon a second charge, of which they were not notified);

Navato v. Sletten, 560 F.2d 340, 346 (8th Cir. 1977) (denial of certificate of completion of residency program, similar holding);

Gonzales v. McEuen, 435 F.Supp. 460, 469 (C.D. Cal. 1977) (expulsion for remainder of year, similar language, but student found to have waived this objection);

Powell v. Board of Trustees, 550 P.2d 1112 (Wyo. 1976) (teacher dismissal overturned because guilt was based upon charge not originally specified);

Matter of Lawlor, 11 Ed.Dept.Rep. 261, 263 (N.Y.Ed.Comm'r 1972) (student suspension cannot be based upon acts not specified in the notice).

Cf.: McCluskey v. Board of Education, 662 F.2d 1263 (8th Cir. 1981) (court overturned expulsion where it found that the school board had based its decision on one of the two rules which the notice had charged the student with violating because the court found that the rule could not possibly under any reasonable interpretation, be interpreted to apply to the student's conduct), rev'd per curiam, 50 U.S.L.W. 3998.25 (7/2/82).

For further discussion, see comments and cases concerning notice of charges in §XI.B, "Notice."

The requirement that the student's conduct be found to violate a specific, publicized standard of conduct is discussed in §V, "Right to Notice of Rules and Punishments."

2. DETERMINATION OF PENALTY

Penalty Only After Finding of Misconduct

On the need for insuring that the determination of an appropriate disciplinary response occurs only after a finding of misconduct, see §XI. G.1, "Determination of Misconduct."

Right to Hearing on the Appropriate Discipline

There is case law supporting the right of a student to a hearing and findings on the appropriate penalty, even when there is no dispute as to the facts of misconduct.

Betts v. Board of Education, 466 F.2d 629, 633 (7th Cir. 1972) (disciplinary transfer) ("opportunity to be heard on the question of what discipline is warranted by the identified offense" and "to present a mitigative argument");
Lee v. Macon County Board of Education, 490 F.2d 458, 460 (5th Cir. 1974) (expulsion) (despite existence of misconduct, "Formalistic acceptance or ratification of the principal's request or recommendation as to the scope of punishment, without independent Board consideration of what, in the exercise of its independent judgment, the penalty should be, is less than full due process");
Taylor v. Grisham, Civil No. A-75-CA-13 (W.D.Tex., Feb. 24, 1975) (Clearinghouse No. 15,925) (following Lee, use of an "automatic" permanent suspension rule for drug use invalid);
Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973 (Sup.Ct., Tompkins County, 1975) (one-term suspension, reversed because of failure to allow student to be heard on the excessiveness of the penalty).

See: Farrell v. Joel, 437 F.2d 160, 163 (2nd Cir. 1971) (suspension for 15 school days);
Tedeschi v. Wagner College, 427 N.Y.S.2d 760, 765 n.* (N.Y.Ct. App. 1980) (expulsion).

Cf.: Braesch v. DePasquale, 265 N.W.2d 842, 846 (Neb. 1978) (exclusion from basketball team for remainder of season) (where students admitted guilt, procedures included hearing on appropriate penalty and were found adequate).

See also:
Morrissey v. Brewer, 408 U.S. 471, 480, 488 (1972) (once it has been determined that parolee violated conditions of parole, determination of whether this warrants revocation of parole must still be made).

Finally, see Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975), where the court stated:

> Yet, even in the context of minor disciplinary action, the student has the right to be afforded an opportunity to present his side of the case. Goss v. Lopez, supra, 419 U.S. [565] at 581...[1975].

This opportunity to be heard is no less important when, as here, there is not a serious dispute over the factual basis of the charge, for

> * * *things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

Id., 419 U.S. at 584 . . . .

On the other hand, the principles above may not apply where the rule under which the student is charged provides for a single, mandatory and automatic punishment once guilt is found (assuming that such a rule is itself legal). In such a case, the hearing tribunal has no decision to make regarding the appropriate penalty, and therefore there is arguably no point to allowing the student to be heard on the issue; the student may, however, still raise a legal claim that the automatic punishment rule operates to impose a penalty which is so disproportionate to the offense that it violates equal protection, substantive due process, or other law. Cf. Mitchell v. Board of Trustees, 625 F.2d 660, 663-64 and n. 8 (5th Cir. 1980). But see Paine v. Board of Regents, 355 F.Supp. 199 (W.D.Tex. 1972), aff'd, 474 F.2d 1397 (5th Cir. 1973), where the court struck down an automatic expulsion rule as imposing an unreasonable penalty. [See also §VI, "Unreasonable, Excessive or Unauthorized Rules or Punishment," and §VIII.A, "Exclusion" (Substantive Challenges).]

Standard of Proof

A few courts have addressed the question of who has what burden of proof on appropriate response (as distinct from the burden of proof on guilt or innocence). See:

Mills v. Board of Education, 348 F.Supp. 866, 882 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days) ("Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension");

Hairston v. Drosick, 423 F.Supp. 180, 184 (S.D.W.Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the burden of proof as to the appropriateness of any proposed placement be upon the school personnel recommending the placement").

Cf.: Chicago Board of Education v. Terrile, 47 Ill.App.3d 75, 5 Ill.Dec. 455, 361 N.E.2d 788 (App.Ct. 1977) (improper to commit student to a parental school for truancy unless board made affirmative showing that less restrictive alternatives were not suitable to meet her needs and that the parental school was suitable to meet those needs).

Indefinite Penalties -- Including Suspension Until the Parent Comes In

Sometimes schools fail to set, or to communicate, a clear, fixed penalty and a specific date upon which the student may, e.g., return to classes. One form of this practice is to condition the student's return upon the parent's actions, such as a parental conference.

Indefinite exclusions are subject to challenge on a number of grounds, all of which are discussed in Substantive Rights, §VII.E.5.a, "'You're Suspended Until Your Parent Comes In.'"

Penalty Limited to the Recommendation in the Initial Notice

"After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings."

Mills v. Board of Education, supra, 348 F.Supp. at 883.

Penalty Proportionate to the Offense

See §VI, "Unreasonable, Excessive or Unauthorized Rules or Punishments -- General Legal Concepts;" as well as the discussion of particular forms of discipline in §VIII, "Challenging Specific Types of Punishment" [for example, §VIII.A, "Exclusion (Suspension, Expulsion, Etc.)"]

3. ISSUANCE OF FINDINGS

Right to Written Findings of Fact, Reasons, Etc.

Courts have generally held that students are entitled to written findings of fact, at least for long-term discipline, and have sometimes required additional detail, in terms of reasons, reference to evidence, etc. See, for example:

Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98, 99 (3rd Cir. 1978) (consent decree) (disciplinary transfer for from six weeks to one year) ("findings of fact");

Esteban v. Central Missouri State College, 277 F.Supp. 649, 652 (W.D. Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (exclusion for two semesters) ("finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action");

Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968) (suspension or expulsion) ("results and findings");

Speake v. Grantham, 317 F.Supp. 1253, 1258 (S.D.Miss. 1970) ("decide this matter in writing and in sufficient detail to disclose the basis of its findings and action taken pursuant thereto");

French v. Bashful, 303 F.Supp. 1333, 1338-39 (E.D.La. 1969), modified and aff'd per curiam, 425 F.2d 182 (5th Cir. 1970) (indefinite suspensions and expulsions) ("findings");

DeJesus v. Penberthy, 344 F.Supp. 70, 76 (D.Conn. 1972) (expulsion) ("action must rest on a specified basis 'set forth with such clarity as to be understandable'");

Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 608 (D.Minn. 1972) (suspension from basketball practice for remainder of season) ("findings of fact, and if there is to be any punishment the basis for such punishment");

Fielder v. Board of Education, 346 F.Supp. 722, 724 (D.Neb. 1972) (expulsion for remainder of year) ("the facts forming the basis of the finding of guilt . . . and the disciplinary action taken");

Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972) (suspension, transfer, or other exclusion from student's normal program for more than two days) ("findings");

Graham v. Knutzen, 351 F.Supp. 642, 668 (D.Neb. 1972) (all suspensions) ["an answer from the school: (1) defining his expulsion; (2) the reasons therefor; and (3) such procedures, if any, to be complied with before reinstatement is allowed"];

Corr v. Mattheis, 407 F.Supp. 847, 853 (D.R.I. 1976) (termination of student's federal financial aid) ("the reasons for his determination amd indicate the evidence he relied on," not enough to simply recite the words of the rule found to have been violated);

Mello v. School Committee of New Bedford, C.A. No. 72-1146F (D.Mass., Apr. 6, 1972) ("substantially stating the evidence on which it is based");

Gratton v. Winooski School District, C.A. No. 74-86 (D.Vt., Apr. 10, 1974) (indefinite suspension) ("the reasons for the determination and the evidence relied upon in support thereof");

Anderson v. Seckels, C.A. No. 75-65-2 (S.D.Ia., Dec. 20, 1976) (Clearinghouse No. 21,627C) (six-month suspensions) ("statement of the school board's finding of fact and determination").

See: Wolff v. McDonald, 418 U.S. 539, 564 (1974) (prison inmates in disciplinary hearings entitled to "written statement by the factfinders as to the evidence relied on and reasons");

Goldberg v. Kelly, 397 U.S. 254, 271 (1969) (termination of welfare benefits).

Cf.: Hairston v. Drosick, 423 F.Supp. 180, 185 (due process required for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the decision include findings of fact, conclusions and reasons for these findings and conclusions");

Doe v. Kenny, C.A. No. H-79-199 (D.Conn., Oct. 12, 1976 (consent decree) (disciplinary transfers) ("reasons on which the decision is based").

Contra:

Linwood v. Board of Education, 463 F.2d 763, 770 (7th Cir. 1972), cert. denied, 409 U.S. 1027 (1972) (expulsion for the remainder of semester) (written findings of fact not required).

Specific, detailed findings serve a number of related purposes. They encourage the hearing tribunal to make sure that the evidence is clear and convincing before finding against the student. (See §XI.G.1.) They also provide a means of encouraging a decision based solely on the evidence presented at the hearing. See Fielder v. Board of Education, supra, 346 F.Supp. at 731 n.7:

> Limiting the making of the decision by the board to the presentations at the hearing safeguards against the possible reliance by the board on unverified assertions and rumors against which no one can be expected in fairness to defend; and a written declaration by the board that it has made its decision solely from the presentations will tend to make it so.

Cf.: Staton v. Mayes, 552 F.2d 908, 915-16 (10th Cir. 1977) (discharge of superintendent, conclusory terms not sufficient, "reasons for the determination and the evidentiary basis relied on" required as "a safeguard against a decision on ex parte evidence");

McGhee v. Draper, 564 F.2d 902, 912 (10th Cir. 1977) (teacher discharge, "due process also required a statement of reasons for the discharge and an indication of the proof relied on . . . to assure that ex parte proofs are not relied on and a reasoned decision is made").

(See §XI.G.1.) Finally, as DeJesus, supra, indicates, one of the reasons for requiring detailed written findings is to provide an adequate basis for review. See Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 95 (1943); and §XI.H, "Appeal and Judicial Review."

Deadline for Mailing Findings

The need for a prompt decision has been addressed in:

Jordan v. School District, supra (within five days of hearing);
Mills v. Board of Education, supra (3 days);
Graham v. Knutzen, supra, 351 F.Supp. at 668 ("Failure to make timely such conclusions and the opportunity to be challenged by the child and his legal custodians is a failure of the due process");
Mello v. School Committee of New Bedford, supra, ("the right to a reasonably prompt decision").
Cf.: Hairston v. Drosick, supra, 423 F. Supp. at 185 (decision concerning placement in special classes issued within 30 days).

A prompt decision is particularly crucial when, because of emergency conditions, the student has been suspended pending the outcome of the hearing.

Procedure for Reinstatement

Some students never successfully return to school from suspensions. It is thus important that the written findings provide definite notice of when and how to return. See Children's Defense Fund, Children Out of School in America, 118, 125 (1974); Children's Defense Fund, School Suspensions: Are They Helping Children?, 50 (1975). See also §XI.G.2, "Determination of Penalty," concerning indefinite penalties.

H. APPEAL AND JUDICIAL REVIEW

Right of Internal Appeal

It is generally recognized that the Due Process Clause does not necessarily require that a school provide for an administrative appeal. The main purpose of an appeal, however, is to insure that the initial hearing body arrived at a fair result through the appropriate due process procedures. Since legally a student can generally obtain judicial review in order to determine whether the hearing body violated his/her right to due process or deprived him/her of some other constitutional or statutory right, an internal appeals process can often correct any such unfairness without unnecessary litigation. (See §XIII.A.2 on judicial remedies.)

Thus, the court in Zanders v. Louisiana State Board of Education, 281 F.Supp.747, 761 (W.D.La. 1968), stated:

> Moreover, we recommend that each disciplinary procedure incorporate some form of appeal. . . . The practicality of this suggestion lies in the fact that this would evidence one more sign of the particular institution taking initiative carefully to safeguard the basic rights of the student as well as its own position, prior to disciplining him for misconduct.

One court has stated that the right of appeal is basic to students' due process rights. In the context of a desegregation case in which the court ordered the development of a new discipline code, the court in Bradley v. Milliken, C.A. No. 35257 (E.D.Mich., July 3, 1975), found the Detroit Board of Education's proposed code inadequate, in part because:

> The Board's proposed code of conduct should include a section which clearly spells out a student's due process rights, viz: . . . the right to appeal. . . . Moreover, the code must provide for an appeal as of right to a panel selected by the Regional Superintendent. The appeal panel should include one member of the community not otherwise associated with the school system, and two members selected from teachers, counselors, and administrators.

Similarly, in Berry v. School District of the City of Benton Harbor, 515 F.Supp. 344, 380 (W.D.Mich. 1981), the court's desegregation remedy included the development of discipline procedures which "should include an opportunity for a prompt appeal by a student or parent to a bi-racial panel of administrative orders to remove or suspend a student."

In a different context, the court in Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972), also ordered an appeals process as part of the due process procedures appropriate to suspensions, transfers, and other exclusions from the student's normal program for more than two days. Cf. Hairston v. Drosick, 423 F.Supp. 180, 185 (S.D.W.Va. 1976) (due process required for placement in special classes would be fulfilled by implementing regulations which provide, in part, "that the parents be afforded a mechanism for administrative appeal").

Appeals procedures can be set up by consent decree. See, for example, Jordan v. School District of City of Erie, Pa., 583 F.2d 91, 98-99 (3rd Cir. 1978) (disciplinary transfers of six weeks to one year). Rights of appeal are often established by state statute or local regulation.

Review Proceedings vs. De Novo Proceedings

Under some procedures, the student's appeal will include a "de novo" hearing, in which everything starts over, the burden of proof is back on the accusers, evidence and testimony is introduced, and a new decision is made without any reference to the decision at the lower level. See, for example, the extensive second-level hearing procedures approved in Jordan, supra.

Most judicial appeals, as well as many internal appeals, however, are review proceedings rather than de novo hearings. See, for example, Mills, supra. Where the administrative or judicial appeal is not de novo, the record of the initial hearing is reviewed and oral argument about the record and the applicable law is allowed, but new evidence, testimony of witnesses, and cross-examination are generally not permitted. Rather than starting with a presumption of innocence and conducting an independent review, such a review starts with a presumption that the lower body's findings of fact were correct. In some cases, however, where this review reveals that a new hearing is required, the appeals body will occasionally provide de novo proceedings itself rather than remand. See Gonzales v. McEuen, 435 F.Supp. 460, 466, 467-68 (C.D.Cal. 1977), where the court, after finding that the initial hearing was presumably tainted by bias, in effect examined the evidence de novo, conducting its own independent examination of the evidence under a "clear and convincing" standard.

Standards for Review Proceedings

"Substantial Evidence"

The proper standard for judicial review of school disciplinary hearings -- and for administrative review when not de novo -- ordinarily is whether the findings were based upon "substantial evidence." (This should not be confused with the higher degree of proof which the hearing body itself must find -- see discussion under §XI.G.1, "Determination of Misconduct," concerning "clear and convincing evidence.") See:

Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973);
Jones v. State Board of Education, 279 F.Supp. 190, 200 (M.D.Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 397 U.S. 31 (1970) (indefinite suspension);
Sullivan v. Houston Independent School District, 307 F.Supp. 1328,

1346 (S.D. Tex. 1969) (suspension "for substantial period of time");

Speake v. Grantham, 317 F.Supp. 1253, 1281-82 (S.D. Miss. 1970) (one-year suspension);

Sill v. Pennsylvania State University, 318 F.Supp. 608, 621 (M.D.Pa. 1970), aff'd, 462 F.2d 463 (3rd Cir. 1972);

Black Students v. Williams, 335 F.Supp. 820, 823 (M.D.Fla.), aff'd, 470 F.2d 957 (5th Cir. 1972) (10-day suspension);

Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972) (suspension "for any considerable period of time");

Vail v. Board of Education, 354 F.Supp. 592, 604 (D.N.H.), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973) (suspension beyond 5 days).

But see:

McDonald v. Board of Trustees, 375 F.Supp. 95 (N.D.Ill.), aff'd, 503 F.2d 105 (7th Cir. 1974) (expulsion) (uses standard of some supporting evidence).

But cf.:

Wood v. Strickland, 420 U.S. 308, 323, 326 (1975) (rejected lower court determination that there was "no evidence" of guilt).

In Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951), the Supreme Court stated,

> . . . "(s)ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."
>
> * * * *
>
> . . . "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

This last point was reiterated in a teacher dismissal case, Thompson v. Wake County Board of Education, 292 N.C. 406 (1977), where the court stated that "substantial evidence in view of the whole record" requires the court to examine not only the evidence supporting the school board's decision, but also other evidence in the record which contradicts or detracts from that decision, although the court may not substitute its own judgment for the board's if there are two views in reasonable conflict.

"Sufficient Evidence"

An alternative formulation is "sufficient evidence." Some support for the use of "sufficient evidence" as a somewhat different concept is found in Freeman v. Zahradnick, 97 S.Ct. 1150 (1977) (Stewart J., dissenting from denial of certiorari). Justice Stewart makes a strong argument that "sufficient evidence" allows the appeals body to review whether or not the hearing body had before it enough evidence to meet the standard required of it. For instance, where the hearing body can find the student guilty only if there is "clear and convincing evidence," the appeals body would reverse a finding of misconduct if it determined that no hearing body could reasonably have found, on the basis of the evidence before it, that there was clear and convincing evidence of misconduct. Thus, "sufficient evidence" can be more finely attuned to the lower hearing body's standard than can "substantial evidence," while still insuring that the appeals body only reviews the findings and does not substitute its own judgment of the evidence.

Evidence Before the Hearing Body

The determination of substantial evidence (or sufficient evidence) must normally be based only upon the evidence that was before the hearing body.

Esteban v. Central Missouri State College, 277 F.Supp. 649, 652 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1979), cert. denied, 398 U.S. 965 (1970);
Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968);
DeJesus v. Penberthy, 344 F.Supp. 70, 77 (D.Conn. 1972).
See: U.S. v. Carlo Bianci & Co., 373 U.S. 709, 714 (1963).

Further, in determining whether there was substantial (or sufficient) evidence, the reviewing body should determine whether there was substantial evidence to prove misconduct on the grounds actually relied upon by the hearing body, and not on grounds which might have been available to the hearing body but which were not in fact relied upon. DeJesus, supra at 76. See S.E.C. v. Chenery Corp., 318 U.S. 80, 95 (1943).

Review of the Penalty

In addition to reviewing whether there was sufficient evidence for the finding of misconduct, the appeals body should also assess whether the penalty is appropriate. Mills v. Board of Education, supra, 348 F.Supp. at 883. See §VI, "Unreasonable, Excessive, or Unauthorized Rules or Punishment -- General Legal Concepts," for commentary concerning penalties which are so disproportionate to the offense as to be found arbitrary or unreasonable in violation of substantive due process or ultra vires when reviewed by an appellate or judicial body.

Review for Other Violations

Finally, the appeals body should review the record to determine whether any of the required procedures or any other rights were violated (including review of any challenges to the validity of the rules in question.) A useful set of criteria for review has been stated by a labor arbitrator in Grief Bros. Cooperage Corp., 42 Lab.Arb. 555 (1964):

> A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. . . .
>
> 1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? . . .
>
> 2. Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business? . . .
>
> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? . . .
>
> 4. Was the company's investigation conducted fairly and objectively? . . .
>
> 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? . . .
>
> 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? . . . If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.
>
> 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service to the company? . . . An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense. . . .

Modification of Penalty

There is some authority protecting the student against increased penalty on appeal. See:

Mills v. Board of Education, supra, 348 F.Supp at 883 (appeals committee "shall determine the appropriateness of and may modify the such decision" but "in no event may such Committee impose added or more severe restrictions on the child").

Cf.: Escobar v. State University, 427 F.Supp. 850 (E.D.N.Y. 1977) (denial of due process when, after discipline committee imposed a sentence following a hearing, president of the college stepped in, reviewed the record, and imposed a different punishment without complying with procedures formally established by the college).

ACCESS TO INFORMATION

XII. ACCESS TO INFORMATION

A. STUDENT RECORDS *

Student records are the official version of a student's history within the public schools. They contain academic grades, reports of disciplinary infractions, participation in activities, evaluations by teachers, I.Q. test scores, achievement test scores, psychological reports, medical histories, and a potentially unlimited variety of other information compiled by school personnel.

Strange things have sometimes found their way into student academic files, including such things as unsupported suspicions of criminal or immoral activity, non-professional psychological opinions and various other inaccurate, unproven, or misleading information. In the past, records were often made available to virtually everyone: police, potential employers, colleges, draft boards, welfare departments, probation departments, etc. -- everyone, that is, except students and their parents.

Many of the most serious abuses hopefully have been eliminated by the Family Educational Rights and Privacy Act -- commonly known as the Buckley Amendment or FERPA -- passed on November 19, 1974 and amended December 31, 1974. (20 U.S.C. §1232g) Final regulations interpreting this law were issued by the Department of Health, Education and Welfare** on June 17, 1976. (34 C.F.R. §§99 *et seq.*) The new law has two basic functions:

(1) To assure parental access to their child's educational records and;
(2) To prevent release of such records to third parties without parental knowledge or consent.

In order to be informed and to protect the rights of the student, parents and students eligible to do so should inspect education records at least once a year.

Schools Covered by the Buckley Amendment

Any public or private agency or institution which receives federal education funds administered by the Office of Education (OE)** must follow the mandates of this law. Virtually all public schools and universities receive money through at least one OE program. If you have any doubts as to whether or not a particular school receives such money, you should write for a free "Guide to OE Administered Programs" from Legislative Reference Service, Department of Education, 400 Maryland Ave., S.W., Washington, D.C. 20202.

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* This section is adapted with permission from Loren Warboys, Joseph Gorden, Eve Block, Education Law Manual for New York State (Statewide Youth Advocacy Project and Greater Upstate Law Project 1977).

N.B. A more extensive analysis of FERPA and background information can be found in Merle Steven McClung, "Student Records: The Family Educational Rights and Privacy Act of 1974," 22 Inequality in Education 5 (1977). Issue No. 22 of Inequality, available from the Center for Law and Education, contains additional articles on FERPA and on record policies in Massachusetts, as well as model forms and copies of statutes and regulations.

** Now the federal Department of Education.

Rights of Access

a. Who?

"Parents" and "Guardians": Parents and guardians of any student who is under the age of 18 or who is a dependent for income tax purposes and who is attending or has attended a school have all of the rights of access covered by the law.

Under the law a school district will assume that either parent has a right of access unless it is proven that a state law, a court order, or binding legal agreement (involving matters as custody, divorce, or separation) provides to the contrary. (34 C.F.R. §§99.3 ("Parent"); 99.11(c))

"Eligible Student": Any student over 18 years or attending a post-secondary school also has full rights to inspect records under the law (with a few exceptions to be noted later). (34 C.F.R. §99.3) A student under 18 years of age who is attending an elementary or secondary school may inspect his or her records if either the school itself chooses to permit student access (§99.4(c)) or the parent grants the student access as a "third party with consent" (see below).

Third Party with Consent: Either a parent or an eligible student may permit any third person -- an attorney, teacher, friend, lay advocate, relative, social worker, et. al. to inspect the student's educational records. (34 C.F.R. §99.30) Such consent must be in writing, signed and dated and must specify:
(a) which records are to be disclosed (e.g. medical, academic transcripts, complete record),
(b) the purpose or purposes of disclosure,
(c) the individual(s) or group(s) to whom disclosure should be made. (34 C.F.R. §99.30)

In addition to allowing access by parents, eligible students and third parties with consent, the school may allow access under the following circumstances without parental consent:

(a) to school officials (including teachers) in the same school district who have been determined by the district to have a "legitimate educational interest." (34 C.F.R. §99.31 (a)(1))

(b) to school officials in a school district to which the student intends to transfer (but only after the parent has had a chance to request a copy of the records and to challenge their contents). (34 C.F.R. §§99.31(a)(2) & 99.34)

(c) to various state and national education agencies, when enforcing federal laws (except for a federal audit of school breakfast program). (34 C.F.R. §§99.31(a)(3); 99.35)

(d) to student financial aid officials only to the extent necessary to determine eligibility for such aid. (34 C.F.R. §99.31 (a)(4))

(e) to anyone whom the school was required to report information pursuant to a state law in effect prior to November 19, 1974. (34 C.F.R. §99.31 (a)(5))

(f) to research organizations (including Federal, State and Local agencies) provided the study is done in a manner which guarantees the confidentiality of the information gathered. (34 C.F.R. §99.31 (a)(6))

(g) to accrediting organizations. (34 C.F.R. §99.31(a)(7))

(h) in compliance with a lawful court order, provided that the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance. (34 C.F.R. §99.31 (a)(9))

(i) to appropriate persons in a genuine health or safety emergency where such information is strictly necessary to protect the health or safety of the student or other individuals (34 C.F.R. §§99.31(a)(10); 99.36)

In addition, certain parts of an educational record may be released by the school to the general public. Such disclosure is strictly limited to "directory information," including such items as name, address, telephone number, academic major, etc. The school must notify parents each year as to what directory information will be made available, and a parent or eligible student may request that the school no include his or her name on the list. (34 C.F.R. §§99.3, 99.37)

A log must be kept as part of the student's record, indicating which third parties (other than the district "school officials" in (a) above) have requested or obtained personally identifiable information from the record and noting what legitimate interests in access they had. (34 C.F.R. §99.32).

b. What?

The Buckley Amendment requires the school to permit access to all information directly related to the student recorded in any form and maintained by the education agency in any place with the following exceptions:

(1) Notes made by a teacher or another school official solely for his or her personal use and which are not disclosed to any other individual, except a substitute (34 C.F.R. §99.3).

(2) Records of the school security police if:
   (a) such records are maintained apart from the education records, and
   (b) such records are kept solely for law enforcement purposes, and,
   (c) such records are not revealed to anyone except other local law enforcement officials, and
   (d) the security police to not have access to any other school records (34 C.F.R. §99.3).

(3) Personnel records of school employees solely relating to and used for employment purposes. (This exception does not apply to persons employed as a result of their status as students.) (34. C.F.R. §99.3).

(4) Records containing information solely relating to a former student's post-graduate activities (34 C.F.R. §99.3). (Not contained in statute.)

(5) Records of a school where a student has applied, but has not attended (34 C.F.R. §99.3).

These are the sole limitations on access for parents. For eligible students there are, however, a few additional restrictions. Eligible students may be refused access to:

(1) psychiatric or other non-educational treatment records created or maintained by, and disclosed to, only those individuals providing the treatment (however, a student may designate a physician or other appropriate professional whom the school must permit to inspect the records (34 C.F.R. §99.3); or

(2) confidential letters of recommendation placed in a student's post-secondary school file prior to January 1, 1975 if such letters were solicited with a guarantee of confidentiality and have been used only for the purpose for which they were solicited (34 C.F.R. §99.12(a)(2); or

(3) confidential letters of recommendation for admission, employment, or honors placed in a student's post-secondary file after January 1, 1975, if the student waived the right to see them, provided that the student is notified of the authors of the letters upon request, the letters are used only for their originally intended purpose, and the waiver is not required as a condition to receipt of any service or benefit from the school (34 C.F.R. §99.12(a)(3)); or

(4) financial statement of parents kept by post-secondary level school (34 C.F.R. §99.12(a)(1)).

c. How: Procedure for Access

While many of the procedures for inspection of records are governed by law, there is some variation from school to school. To do successful advocacy, you should familiarize yourself with the procedures of the school(s) in which you will be working. Under the law, every school is required to prepare annually a list of procedures and policies governing access to records. (34 C.F.R. §§99.5, 99.6) The policy must also include: provisions for annual notification of parents and eligible students of their rights under the Act and of where they may obtain copies of the policy (with effective notice for parents of students with a different primary language); a fee schedule for copies and a statement of the circumstances in which the agency feels it can legitimately deny copies (as distinct from access, which cannot be denied at all); a list of what types of records are maintained in which locations by whom; criteria for deciding who are "school officials" with "legitimate educational interest" for purposes of access (see above). Parents and eligible students are entitled to copies of this policy under the Buckley Amendment and other individuals should have access through state freedom of information laws. The following are some general rules governing inspection:

(1) Timing. A school must respond to a written or oral request to inspect records "within a reasonable period of time" not to exceed 45 days in any case (34 C.F.R. §99.11).

(2) Method of Inspection. Persons with rights of access are entitled to physically inspect all records regardless of their location (except that third parties with consent are limited to the records described in the consent and other third parties are subject to the limits described above). Eligible parents and students may request access to "all" their records, without having to specify particular records, of which they may not have knowledge. School officials can not refuse to allow time to actually examine each document. However, they may insist that an official be present during such an inspection; obviously, they may also prevent removal of documents from school premises. A parent may bring a friend or representative along, although a written consent form may be required by the school.

(3) Copying. A school is legally obligated to provide copies of educational records upon a parent's request whenever:
   (a) records are transferred to another school (34 C.F.R. §99.34(a)(2);
   (b) information is released to a third party (34 C.F.R. §99.30(d); or
   (c) denial of copies would effectively deny the right of inspection (34 C.F.R. §99.11 (b)(2)).

While these are the only times a school must provide copies, there is no provision barring a school from providing parents or eligible students with copies in other circumstances, and there is little logic in denying such copies. Be sure to consult local school policy, to determine your rights in this situation. A school may charge a reasonable fee to cover solely the cost of copying. It may not charge for for staff time expended searching for or retrieving records. (34 C.F.R. §99.8(a)(b))

Challenging Information in School Records

The Buckley Amendment provides a multi-step process for challenging information found in an educational record.

a. A parent or eligible student may request that a school amend or delete any information believed to be inaccurate or misleading or which violates the privacy or other rights of a student. (34 C.F.R. §99.20 (a)). Such requests apparently may be oral or in writing. The school must either agree or refuse within a reasonable period of time (34 C.F.R. §99.20(b)).

b. If the school refuses to amend, a parent or eligible student may request a hearing on the issue. (34 C.F.R. §99.20 (c)). The hearing must be conducted within a reasonable time and there must be:
   (1) reasonable advance notice of the time of hearing;
   (2) an unbiased hearing officer (the hearing officer may be an employee of the school);
   (3) an opportunity to present evidence;
   (4) the right to be represented by any individual the parent or eligible student chooses; and
   (5) a reasonably prompt decision in writing based solely on the evidence presented at the hearing, summarizing the evidence and stating the reasons for the decision (34 C.F.R. §99.21(b)).

c. If the school then decides to refuse to amend the record, the parent or eligible student may place a statement into the educational records explaining why he or she considers the record unfair or inaccurate. This statement must be included any time the contested portion of the record is released to any third party (34 C.F.R. §99.21(c)(d)).

d. Court action. The Buckley Amendment does not specifically grant a parent or student the right to contest in court a school's refusal to amend. If the administrative procedures spelled out above have been completed and the result is still unsatisfactory, an attorney should be consulted. (See below.)

Violations of the Buckley Amendment

If a school fails to comply with any of the rights guaranteed by the Buckley Amendment, you should send a written complaint to:

The Family Educational Rights & Privacy
Act Office (FERPA)
Department of Education
330 Independence Avenue, S.W.
Washington, D.C. 20201

Explain, in detail, the specifics which you believe constitute a violation of the law, including names, dates, etc. You may wish to include your home and office phone number to help speed up the process. The agency will then notify the school of the complaint and request a written statement from them. Based on this information, a decision will be made in writing and sent to the complainant and the school. If the agency agrees that the law has been violated, it will notify school officials what they must do to comply with the law and will set a timetable for compliance.

Failure of the school to recognize a parent's or student's legal rughts under the FERPA may result in an order from HEW terminating all federal funds to the school district.

Right to Judicial Relief

While FERPA contains no explicit provision for private enforcement in court, a private right of action for parents and students under the Act may arise by inference under the standards set forth in Cort v. Ash, 422 U.S. 66 (1975). The case law on this question is limited. Compare:

Maria de Lourdes P. v. Riles, No. C-121905 (Cal.Super.Ct., Los Angeles County, 9/17/75) (Clearinghouse No. 16723) (private cause of action);

with:

Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977) (no private cause of action).

Cf.: El Concilio Valle San Gabriel v. El Monte Elementary School District, No. C-177176 (Cal.Super.Ct., Los Angeles County, 10/4/76) (Clearinghouse No. 19501) (preliminary injunction granted under FERPA).

But Cf.:

Student Bar Association Board of Governors v. Byr[illegible] [illegible]9 S.E.2d 415 (N.C. 1977) (FERPA does not actually prohibit unauthorized disclosures; it only prohibits provision of federal funds to agencies which engage in such disclosures).

[continued on next page]

Even if it is held that FERPA provides no private cause of action, there may be a cause of action instead under 42 U.S.C. §1983 for deprivation of rights secured by FERPA, under the doctrine articulated in Maine v. Thiboutot, 100 S.Ct. 2502 (1980), and discussed in § XIII.A.2.c.

Additional Laws and Regulations

Education for All Handicapped Children Act. There are special regulations under the Act concerning the records of handicapped children. 34 C.F.R. §300.15. These regulations mirror, supplement, and in some cases extend, the general provisions of FERPA.

Bureau of Indian Affairs Regulations. The Bureau has issued student records regulations for all schools run by it or by contract with it. 25 C.F.R. Part 36. These largely reflect FERPA, with some additions.

State Law. Many states have statutes or regulations concerning various aspects of student records. In some cases they extend, clarify, or improve on the provisions of FERPA. See, for example, the Massachusetts Regulations Pertaining to Student Records (issued pursuant to M.G.L. Chapter 71, Section 34D and F), reprinted in Issue Number 22 of Inequality in Education. See also Opinion of the Attorney General, Open Records Decision, No. 152 (Texas 1/28/77) (Clearinghouse No. 23,920) (right to copies of college transcripts under state law).

FERPA and Access to Records for Use in Lawsuits

As noted above, access to student records may be obtained under FERPA without the consent of the parent or eligible student through use of a subpoena or court order, provided that the parent or eligible student has been given advance notice, presumably so that s/he will have an opportunity, if s/he chooses, to challenge the release in court. This has been addressed in several cases in which student advocates sought large numbers of student records in lawsuits challenging school practices as, for example, racially discriminatory. The courts generally have concluded that (1) FERPA does not create an "evidentiary privilege" which would bar any such court order; (2) normal standards for granting or denying discovery orders will apply, including relevance and the existence of any competing privacy interests; and (3) a variety of safeguards are available which can allow for granting the order while minimizing the risk of improper disclosures to third parties outside the lawsuit. Thus, courts have supported the requests for such orders. See, for example:

Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977);
Ross v. Disare, C.A. No. 74-Civ.-5047 (S.D.N.Y. 9/7/77) (this is the same case as Ross v. Saltmarsh, which resulted in the extensive settlement of discriminatory discipline claims discussed in §III.A);
Mattie T. v. Johnston, 74 F.R.D. 498 (N.D.Miss. 1976);
Reeg v. Fetzer, 78 F.R.D. 34 (W.D.Okla. 1976);
Manwell v. Wood, C.A. No. 73-4262-G (D.Mass. 2/9/77);

Board of Education v. Butcher, 402 N.Y.S.2d 626 (Sup.Ct.App.Div. 1978);
Valadez v. Graham, C.A. No. 78-16-Civ.-Oc. (M.D.Fla. 3/19/79) (Clearinghouse No. 25,220D).

FERPA and Freedom of Information

Potential conflicts between the privacy rights recognized in FERPA and the public right to information recognized by freedom-of-information laws can generally be resolved by careful attention to the words and intents of both sets of requirements. This is discussed in §XII.B.

Cross References

See:

§XI.D, "Access to Evidence Before the Hearing," on due process access rights in that context;
§VII.E.5.b, "Punishment of Students for Nonpayment of Fees," on withholding of records.

B. OTHER RECORDS -- FREEDOM OF INFORMATION LEGISLATION

1. Legal Rights to Information

Over the years government has gradually increased its role in people's lives. This is clearly the case in the education field. Accordingly, it is important to know how to obtain operating regulations, procedures, policies, and interpretations of policies, statistics, budgets and other information from government agencies.

Major federal legislation was passed in 1974 for the purpose of strengthening the right of the public to obtain information about and from the federal government. In addition, most states have public records laws or state freedom of information laws granting access to records which do not identify individual students.

a. The Federal Freedom of Information Act

The federal Freedom of Information Act (FOIA) (5 U.S.C. §552) opens federal agency documents to disclosure either by publication in the Federal Register (a daily Federal publication available in many public libraries and law libraries), or upon request, by personal inspection and copying. For example, this law can be used to obtain information concerning federal grants to a school district, copies of federal administrative staff manuals which affect the public and indices of federal agency documents required to be made public under the Act.

Requests for documents are made by letter to the appropriate federal agency in manner which "reasonably describes" the documents desired. The law calls for the agency to produce or refuse to produce the documents within 10 days, or request up to a 10-day extension for "good cause." Requests may be refused only if they fall within one of the nine exceptions contained within the Act. These exceptions or "exemptions" briefly include:

1) properly classified national defense or foreign policy information;

2) certain internal personnel matters;

3) any material specifically exempted by law;

4) certain privileged and confidential trade secrets, commercial and financial information;

5) information which would be privileged in civil litigation;

6) certain files the disclosure of which would constitute a violation of privacy (individuals are entitled to obtain federally maintained records containing information about themselves through the related federal Privacy Act, 5 U.S.C. §552a);

7) certain investigatory files;

8) certain bank records; and

9) oil well data

(The full text of these exceptions appears at 5 U.S.C. §552[b][1]-[9]. It is evident that most of these exemptions -- except those concerning the privacy rights of students and teachers -- are unlikely to justify refusals of requests for information by education advocates).

If the agency does not respond to a request within 10 working days, an administrative appeal may be taken. Administrative appeals may be more effective if done by an attorney. A denial of an administrative appeal, or a failure to respond to an appeal within 20 days may be followed by litigation.

An agency is permitted to charge a fee to cover the direct cost of searching for and copying documents. The charge may include a fee for personnel time. Agencies are authorized, however, to reduce or waive fees where information can be considered as primarily benefiting the general public.

[The above is reprinted from Education Law Manual for New York State, supra. The kinds of records which it may be useful for school discipline advocates to obtain from federal agencies are discussed below.]

b. State Freedom of Information Acts

[The following is reprinted with permission from the Federal Education Project Newsletter, February, 1982, pages 5-8. It was written to aid parents in obtaining information about "Chapter 1," the federally funded program for compensatory education, but it provides a useful overview of the legal rights for obtaining records from state and local education agencies which may be useful for working on discipline issues.]

USING STATE FREEDOM OF INFORMATION ACTS TO GAIN ACCESS TO INFORMATION

Effective parental involvement may require new approaches under Chapter 1, which will replace Title I beginning in the fall of the 1982 school year. The new law does not mandate Parent Advisory Councils, nor does it require State and Local Educational Agencies to release information to parents such as application forms, records showing how money was spent, monitoring reports and other information parents had access to under Title I. These guarantees have been lost at the same time that the Reagan Administration has made its intention to return more control and decision making authority to states and localities. In the months since Chapter 1 was passed, it has become apparent that the Department of Education will assume a greatly reduced role in determining how services to educationally deprived children are administered. States and localities will increasingly be able to devise their own record-keeping systems and their own reporting requirements. Since in most instances they are no longer required to report extensively to the federal government, you will only be able to obtain these records from state and local agencies. While many State and Local Educational Agencies (SEAs and LEAs) will probably continue effective parental involvement and allow parents access to records and information on Chapter 1 programs, in the absence of strong federal laws and regulations, some may not. This is where State Freedom of Information Acts may be useful. The following questions and answers are intended to give a general idea of what State Freedom of Information Acts are and how to use them.

- What is a State Freedom of Information Act (FOIA)?

State FOIAs are state statutes which give citizens the right to inspect records held by state and local governments and agencies. They are also known as "Right to Know Laws," "Public Records Laws," "Freedom of Information Laws" and other names. Each state has its own law. They are very different from each other, so if the occasion arises to use a state FOIA, review the particular law in your state.

- Why can't the federal FOIA be used?

The federal FOIA is the one we are all most familiar with. However, this law only applies to records held or kept by federal agencies, such as the Department of Education. Therefore, it cannot be used to obtain records held by SEAs and LEAs.

- May all records kept by SEAs and LEAs be obtained under state FOIAs?

No, not all records held by state and local agencies may be reached under state FOIAs. The definition of what constitutes a "public record" varies widely from state to state. However, all records kept in order to carry out Chapter 1 will probably fall within any of the state FOIA definitions of public records. SEAs and LEAs will also generally fall within the definition of a public body or agency from which records may be obtained. In most states there will be certain kinds of records that are exempt from disclosure. While these exemptions also vary widely from state to state, some are almost standard such as police and investigatory records, state test scores and keys, medical and other personal files and trade secrets. Most of these general exemptions will not apply to information regarding Chapter 1, except possibly individual student records. Some states also have a general exclusion section, which provides for an exemption from disclosure if disclosure would not be in the public interest. In all probability, this would not apply to records kept under Chapter 1; but in any case, the burden is on the record-keeper to show that disclosure would be contrary to the public interest.

- What if you are not sure if the information you are seeking can be obtained under the FOIA?

Although all information cannot be obtained under state FOIAs, unless the information you are seeking clearly falls within an exception to the Act, request it. It is up to the agency to justify its refusal to supply information. Since most records which would be kept under Chapter 1 probably do fall within most state FOIAs, you should not hesitate to use your state Act when necessary.

- **Is an attorney needed to use a state FOIA?**

No, using a state FOIA is a simple matter which does not require the assistance of an attorney.

- **What is the first step in trying to obtain public records?**

The first step is to have a good idea of the specific information you are seeking. If at all possible, maintain good relations with education officials and try to get information informally. If access is denied, then use the FOIA.

- **How is information requested under a state FOIA?**

Some states require agencies to make rules and regulations regarding public access, so some agencies may have forms or procedures in place. In the absence of forms, a simple request letter indicating the specific information desired and the FOIA section you believe it is available under will suffice. The most important rule is to know exactly what type of information you are seeking and if at all possible what form it will be in. Huge requests for unspecified material may lead to a denial of your request. It is also important to have some idea of the agency or office which keeps the particular record or information you are seeking.

- **May copies of the records be obtained?**

Whether the right to inspect records includes the right to copy them again varies from state to state. Generally, however, there is a right to make copies as long as what you are requesting is not so voluminous as to disrupt the agency's operations. Records usually must be made available for inspection at reasonable times. The goal of a FOIA is not to disrupt an agency's general business but at the same time to allow free access to records by the public. The record's custodian must balance and reconcile these interests.

- **How are copying costs determined?**

All states require the person requesting the records to pay copying costs, although a few states make an exception for those who cannot pay. Some statutes list the fees to be charged or require the agency itself to compose a fee schedule. A fee may also be imposed for searching for the record or for the custodian's time while the record is being inspected or copied. In all cases, however, the fee must be reasonable, which generally means it cannot be so high that it discourages people from exercising their right to inspect and copy records. Usually fees cannot exceed actual costs.

- **When will the agency respond to the request?**

Generally, the agency will be required to respond to a request within a certain time period, which is set out in the statute or regulations or within a reasonable time, which generally will not exceed 15 working days.

- **What may the agency's response be?**

The response may be the information requested, a denial with or without reasons, or a letter explaining that there will be a delay in responding to the request.

- **Does a delay in answering mean the record will not be released?**

No. Generally, an agency may delay answering a request on several grounds. These include needing more time to assemble the record, to decide if the record should be released, or to segregate portions of the record the agency believes cannot be released. These reasons may be entirely legitimate and should not be taken as an act of bad faith on the part of the agency. Thus, a delay may result in obtaining the entire record, a portion of the record, or a denial of the request.

- **What does "segregating" a portion of the record mean?**

Some statutes specifically provide for segregating portions of a record that cannot be released from portions that can be released. The part that can be released will then be given to the person requesting the information. Where part of the record is not released, the requestor can usually appeal to obtain its release. Statutes with such a section are good because it may allow parts of a record which may have been completely kept secret to be released.

- **What happens if the request for information is denied?**

A denial may usually be appealed administratively, such as to a higher up in the agency or to an independent body such as a public records commission, or to a state court. If there is no explanation for denying access to the records, the requestor will have to go through the additional steps of finding out why the request was denied. Most states also allow the requestor to appeal to state courts to obtain an order compelling disclosure when access is denied by the agency. The burden of justifying confidentiality is generally on the record-keeper. In many states, FOIA cases are given priority on court calendars. Many states also have penalties for wrongful withholding of records. Penalties include impeachment or removal from office, which is rare, or fines and/or imprisonment, which are more common. Penalties, however, will probably be imposed only in cases of willful and malicious misconduct. If you are denied access to information and feel the denial is wrong, you should appeal. Your local legal services office may be able to give you some type of assistance in how to process such an appeal.

If you need to use your state Freedom of Information Act, a packet with more specific information on how to use and find your state act, as well as sample request and appeal letters, is available from the FEDERAL EDUCATION PROJECT. Also, feel free to consult your local legal services office. They may be able to assist you at the appellate stage. Finally, if the need arises, don't hesitate to use your state FOIA. It is simple to use and available for your benefit.

c. Reconciling Freedom of Information and Privacy Acts (Right to Anonymous Information)

As a general rule, rights to obtain information under freedom of information acts and rights of privacy under FERPA or similar acts (see §XII.A) can be harmonized because the student's/parent's privacy rights are limited to personally identifiable data, while freedom of information acts generally create an exception for such personal data.

Advocates and others, however, sometimes seek access to school data which is in the form of individual records, not because they are focusing on a particular student but because they are interested in patterns, such as test scores, disciplinary referral data, etc. concerning a group of students. So long as the information remains identifiable, they will be barred from access (unless the information is obtained in the course of litigation through subpoena or court order, rather than through the Freedom of Information Act -- see discussion of FERPA and access to records for use in lawsuits, in §XII.A). In response to this dilemma, some courts have held that the state's freedom of information act imposes an obligation on the school system to delete the personal identifiers so that the information can be released.

In Shedd v. Freedom of Information Commission, No. 137388 (Conn.C.P., Hartford County, 2/23/78) (Clearinghouse No. 23,907A), the state board of education was ordered to delete or mask personally identifiable data on annual reports of students who had dropped out and to release it to a legal services attorney. The state act was interpreted to contemplate such action, and, with the names deleted, the court found that the data were public records and not personally identifiable.

In Kryston v. Board of Education, 430 N.Y.S.2d 688 (Sup.Ct., App. Div., 2nd Dept., 1980), the court went one step further. It found that an alphabetized list of 75 students' test scores would be personally identifiable information even with the names removed because of the relatively small number, and that release in that form would violate both state privacy requirements and FERPA. It then held that the state freedom of information act obligated the school system to scramble the order of the scores as well as delete the names so that the information could be released. Although the state act said that public bodies would not be required "to prepare any record not possessed or maintained," the court held that the deletion of names and the scrambling did not constitute the preparation of a new record, emphasizing that the act should be liberally construed to favor disclosure.

See also:

Merle McClung, "Student Records: The Family Educational Rights and Privacy Act of 1974," 22 Inequality in Education 5, 33 and n. 126-33 (1977);

Opinion of the Texas Attorney General, Open Records Decision No. 152 (1/28/77) (Clearinghouse No. 23,920) (state open records act gave student the right to obtain a copy of his own transcript in that FERPA did not bar this result).

Sources of Information

a. Office for Civil Rights Data Forms

Under federal civil rights laws, many school districts are required to submit to the Office of Civil Rights in the Department of Education statistical data concerning a number of school practices including race/ethnic, sex, and handicap breakdowns.

In 1980, for instance, over 5,000 school districts were required to file, and the questions asked for figures, mostly by race, sex, handicap, and limited-English proficiency, in areas such as:

(a) enrollment;
(b) enrollment in bilingual programs;
(c) suspensions;
(d) expulsions;
(e) corporal punishment;
(f) enrollment in programs "for the socially maladjusted;"
(g) enrollment in gifted and talented programs;
(h) enrollment in various special education programs:
(i) a sampling of classroom enrollments;
(j) participation in home economics, industrial arts, physical education classes, and interscholastic teams;
(k) graduates.

The forms are referred to as AS/CR 101, for system-wide data, and AS/CR 102, for data on each individual school (OS/CR 101 and OS/CR 102 prior to 1980). They are usually collected in even years (e.g., "Fall 1982" for the 1982-83 school year). In previous years (especially 1976), the survey sometimes covered more information and more districts.

These forms are public documents. They are thus available under the federal Freedom of Information Act at both the regional and Washington, D.C. offices of the Office of Civil Rights. In many states, the state freedom of information act or public records act also guarantees public access to the copies of these documents maintained by the school system. A good source of additional information concerning the OCR forms is the Children's Defense Fund, 1520 New Hampshire Avenue, N.W., Washington, D.C. 20036.

b. National Summaries and Analyses of Discipline Data

The Office for Civil Rights has in past years compiled summaries of information from the above OCR data forms. One page from the 1980 national summary, showing national totals for a variety of information collected on the forms is reprinted as an appendix to §III.A. of this manual.

This compilation also contains a variety of state tables. It has previously included ranked lists of the "worst" school districts on a variety of scales. In previous years, OCR has also published paperbound volumes with data from the forms for each district individually.

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Other useful sources of national data and analysis on school discipline include:

Children's Defense Fund, School Suspensions: Are They Helping Children? (1975)(OCR data, CDF's own study, interviews and other materials);

National Center for Education Statistics, Discipline and Order in American High Schools (November, 1981)(available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, Stock Number S/N 065-000-00126-8, for $7.50)(questionnaires and interviews with a large sample of students, parents, teachers, and administrators in approximately 1000 schools analyzed concerning frequency of absenteeism and other student conduct, student characteristics, school characteristics, and school climate).

c. Other Sources of Data*

1. State Department of Education Statistical Information Office. Most state departments of education have some central data management office that receives and records data, particularly of a statistical nature, that is needed for record keeping and reporting purposes. Data may be kept on computer tape, as hard copy of computerized data, as raw data from local districts, or in the form of reports or other compilations of data from local districts. Much of the data is maintained pursuant to state or federal requirements. Before approaching this source, one should become familiar with the data keeping requirements of the state and the requirements of the federal government (particularly the Office for Civil Rights/Department of Education) has imposed.

State education department information offices are rich sources of older information on the various school districts. Often detailed information on pupil composition, standardized test results, resource inputs,[1] discipline, dropouts, special education, etc., can be found on a school by school or even classroom by classroom level. This state office will be the prime source of data on the disparities between black and white schools prior to desegregation. (See §III.A., "Race and National Origin Discrimination," for relevance of this data.)

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[1]
- a. size of facilities
- b. age of facilities
- c. quantity/quality of equipment
- d. age of textbooks
- e. size of libraries
- f. students/teacher ratio
- g. pay differentials
- h. teacher educational levels
- i. course offerings (variety/type)
- j. guidance counseling
- k. extracurricular activities
- l. dollars per pupils
- m. double sessions
- n. combining of grades

*Adopted from Center for Law and Education, Minimum Competency Testing: A Manual for Legal Services Programs (1979).

2. State Department of Education Library. These libraries are likely to hold official reports by the Department of Education, executive offices, other departments, and special panels, commissions, local school districts, etc. These documents may recognize a host of educational problems that have affected the quality of education to which students have been exposed.

3. Office for Civil Rights, Department of Education (OCR). (A list of regional offices can be found in §XIII.C.) The Regional office maintains extensive files for each state, by school district. Available data includes civil rights complaint letters, reports of on site reviews, letters of noncompliance with ESAA (Emergency School Aid Act - federal funds to assist desegregating school systems)* requirements, administrative decisions terminating ESAA funding for Title VI violations, some annual school district ESAA applications, and a host of other data that will be useful in showing a continuing pattern of racial discrimination in education. The ESAA applications are particularly important because they often contain a discussion of racial problems by local district officials. These statements cover a wide range of problems including human relations, low black achievement and its relationship to prior segregation, disproportionate black suspensions and expulsions, low teacher expectations, and other second generation desegregation problems.

4. Desegregation Technical Assistance Centers. (regionally located). These centers have worked closely with desegregating school districts and may have a good deal of data on pre-desegregation and early post desegregation problems.

Your state may also have its own technical assistance program, established with federal funds. Such programs should not be overlooked since they may well have been intimately involved in the desegregation process in many districts. Its files and reports may be a good source of data via discovery on the continuing nature of racial discrimination in education.

5. U.S. Department of Education (Washington, D.C.) Will be another valuable source of local district ESAA applications which are not available from the regional office. These applications may also be retained by state and local authorities.

6. Court files. Court files of particular desegregation cases may contain findings or other data which will help prove the inequality of black schools from a number of perspectives. Courts may be willing to take judicial notice of such data which may save a great deal of effort during discovery.

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*The last year of operation for this program was 1981-82.

7. United States Commission on Civil Rights. The Commission has held hearings on education in the region and published transcripts as well as other reports and documents, which may be helpful in proving racial discrimination in education, especially during the desegregation process. There are also advisory panels to the Commission which may have published helpful reports in some states.

8. Other sources. Do not overlook other common sense sources of data like black teachers who taught in both black and white schools. Local officials of the N.A.A.C.P. and other such organizations who were involved in the struggle to desegregate the schools may be helpful. Teachers at state colleges of education may be good sources. Predominantly black colleges, particularly those with strong graduate programs, may be the source of original research on racial problems in the schools and other helpful information.

Federal Program Applications and Evaluations. In order to obtain funds under a variety of federal programs, local education agencies submit applications -- in some cases to the federal government and in other cases to the state eduation agency -- and conduct evaluations of those programs. The applications and evaluations often contain illuminating information about how the local system functions, problems it has identified, student and staff data, etc. Below is a partial list of programs, and of where copies of applications and evaluations are maintained. In addition, of course, copies can be obtained from the local system itself, using the state freedom of information act if necessary.

Title I/Chapter 1 -- the largest federal program for elementary and secondary schools, provides compensatory education programs for students achieving below grade level who are in schools with high concentrations of low-income students (applications, etc. maintained at state education agency).

Chapter 2/Education Block Grant -- starting with 1982-83 school year, replaces a large number of categorical programs, and can be used for any of a broad variety of purposes (at state education agency).

Public Law 94-142/Education for All Handicapped Children Act -- see §III.C for description (at state education agency).

Bilingual Education Act/Title VII -- see §III.A for description (at U.S. Department of Education in Washington, D.C.).

Emergency School Aid Act -- assistance to desegregating districts; repealed and merged into Chapter 2 beginning with 1982-83 (at U.S. Department of Education in Washington, D.C.).

Vocational Education Act -- as it says (at U.S. Department of Education in Washington, D.C.).

Indian Education Act -- supplemental programs to meet special needs of Indian children in public schools (at U.S. Deparmtent of Education in Washington, D.C.).

Johnson-O'Malley Act -- supplemental programs for Indian children (at Bureau of Indian Affairs in Washington, D.C.).

XIII. REMEDIES, ALTERNATIVES, AND STRATEGIES

In representing students and parents, it is essential to help them clarify and define for themselves the problem, the kind of relief that they want and will find meaningful, their strategy for obtaining that relief, and the role of legal advocacy in that strategy. This requires a commitment to thorough, on-going discussion with them at all stages of the advocacy process. (See also §D on working with students.)

While the focus in a school discipline case is usually on a dramatic event -- exclusion from school -- it cannot sensibly be divorced from the less dramatic, daily processes of educational and institutional life which occur while the student is in school, which led up to the event, and which the student will again face upon returning. Both remedy and strategy may need to take into account that many of the students who are excluded from school have long before been effectively excluded from meaningful education and/or participation in the life of the institution. (See §III.A.)

At the same time, advocates who seek to protect students' rights cannot afford to ignore or dismiss real concerns about "lack of discipline," "order," and "student responsibilities." No one should confuse a cooperative approach to setting norms and defining institutional order in a democratic society with a laissez-faire approach where there is no order. For an example of one possible response see 24 Newsnotes 2, 5 (1981):

> In seeking to enforce students' constitutional rights, to limit the use of suspension and expulsion, and to challenge the disproportionate disciplining of Black, Hispanic, and Native American students, education advocates have been charged with contributing to classroom chaos and disorder, school system bureacracy and paperwork, and staff demoralization.
>
> Advocates can meet these charges in part by a different explanation of these problems, pointing out that:
>
> - when schools have based their appeals for good performance, behavior, and attendance more on the extrinsic rewards of obtaining a high paying job than on the intrinsic rewards of learning, a declining economy with fewer economic opportunities is naturally likely to decrease student motivation to behave well;
> - when workplaces are organized so that rules are passed down and must be followed by workers who have little role in making them and few rights of self-expression on the job, then school socialization for undemocratic work roles creates a definition of order and discipline in the schools which is in conflict with education for democratic citizenship;
> - when schools are given the job of preparing students for different places in that work hierarchy, based in large measure on race and class, then different groups of students will likely be treated to different levels of self-governance, self-initiative, and verbal expression, and thus different notions of what is a "discipline problem;"
> - when teachers themselves are part of an undemocratic workplace, their frustrations are more likely to result in teacher-student conflict, and their conduct is less likely to serve as a role model of self-directed behavior for students.
>
> At the same time, advocates must be prepared to offer a positive program for creating order in the schools, based on a democratic community development perspective—an institutional order which fosters, rather than conflicts with, individual students' rights. As communities move toward democratic control over their resources, including democratic forms of workplace organization, education in the exercise of democratic decision-making and individual rights for all becomes essential. Evidence that real worker participation, expression, and decision-making power have reduced absenteeism and other workplace problems and have increased productivity should be applied to school discipline issues as well, making the benefits of this perspective more obvious.

In short, is the school educating students for a responsible role in a democratic society? [And if not, is that in part because the society itself provides no such roles for large numbers of these students? To the extent that the problems faced by low-income students in school are in some measure a reflection of the problems faced by low-income people in the community at large, the legal services program which serves these people across a broad range of their legal problems (e.g., on employment issues) can try to avoid addressing these problems in isolation from each other.]*

The sampling of remedies, alternatives, and strategies in this part of the manual by and large focuses on school discipline per se, albeit from a broad perspective (e.g., staff in-service training, student participation in establishing rules, etc., as well as individual remedies). This focus should not, however, obscure the connection between these disciplinary issues and the overall educational and institutional experience for students. Students actively engaged in meaningful education and given real responsibility for the school's community life are usually not "discipline problems."

Some school officials claim that the courts, in enforcing students' rights, have improperly taken away the ability of educators to make educational judgments. Yet these same school officials sometimes themselves use legal authority to abdicate their responsibility for exercising educational judgment. When questioned by parents or students about the wisdom or fairness of certain practices or policies, they sometimes respond merely by claiming that what they are doing is legal and that such practices have been upheld by the courts. Instead, parents and students should be able to expect that constitutional minimum requirements are but a starting point and that the educational community can be held accountable for justifying decisions as educationally sound as well as legal. (In particular the school's function as an educational institution should lead it to address discipline as a problem for study, inquiry, debate, and reasoned strategies on the part of the entire school community.)

Similarly, when students or parents voice complaints to a legal services program or other advocate about such practices, that representative should not merely inform them as to the practices' legality but should advise them as well of available legal avenues for seeking to change such practices (e.g., open meeting laws, rights in communicating with other students and parents, etc.).

The Center for Law and Education has available a good deal more material on remedies, alternatives and strategies than can be reprinted here. Advocates may also wish to contact the National Coalition of Advocates for Students, 740 East 52nd Street, Indianapolis, IN 46205, (317) 283-5900. The Coalition, which originally was formed out of concern for school suspensions, has established a network of advocacy groups which work to protect the rights of "children at risk" -- particularly poor, minority, and handicapped students.

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* The emphasis here on external factors which shape schools should not be used as an excuse for helplessness by schools or for blaming all their problems on their students. Different internal school practices and structures are related to widely differing rates of attendance, delinquency, and misconduct among schools serving equivalent student populations. See Michael Rutter, et al., Fifteen Thousand Hours: Secondary Schools and Their Effects on Children (1979).

A. REMEDIES

1. OUTLINE FOR SAMPLE SETTLEMENT AGREEMENT OF DISCIPLINARY CLASS ACTION

The following is a sample outline for settling a discipline case involving a range of issues, including racial discrimination, violation of procedural and substantive due process, vagueness and overbreadth, and illegal discipline of handicapped students. Its intended use would be only as an outline of points to be covered, not as a final decree, which should be a good deal more specific in many areas.

This outline should be carefully compared with the consent decree in Ross v. Saltmarsh, 500 F.Supp. 935 (S.D.N.Y. 1980), discussed in §III.A, "Race and National Origin Discrimination." In that discriminatory discipline suit, plaintiffs obtained a provision requiring that the disparity in suspension rates by race be eliminated and that committees be established to develop plans toward that end. There may be a variety of ways to combine the two approaches.

Other disciplinary cases which have resulted in substantial changes in rules and/or procedures include:

Mills v. Board of Education, 348 F.Supp. 866, 882-83 (D.D.C. 1972);
Jordan v. School District, 583 F.2d 91 (3rd Cir. 1978) (consent decree);
Vail v. Board of Education, 354 F.Supp. 592 (D.N.H.), remanded for further relief, 502 F.2d 1159 (1st Cir. 1973), consent order, C.A. No. 72-178 (4/18/74);
Winters v. Board of Education of City of Buffalo, C.A. No. 78-75 (W.D.N.Y. 5/25/78) (consent decree);
Smith v. Ryan, C.A. No. B-75-309 (D.Conn. 10/25/78) (Clearinghouse No. 25,461) (consent decree);
Bobbi Jean M. v. Wyoming West Valley School District, C.A. No. 79-576 (M.D.Pa. 11/3/80) (Clearinghouse No. 30,528B) (consent decree);
Desegregation cases discussed in §III.A., which ordered disciplinary codes and other related relief as part of desegregation remedy.

See also:

Center for Law and Ed., Model Code of Student Rights and Responsibilities;
Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Schools and Education (Tentative Draft, 1977).

The Center also has available other model proposals for spelling out in greater detail many of the provisions below.

* * * * *

The consent decree will include the following:

1. A statement that the discipline system as practiced at ____________ has violated the rights of plaintiffs and the class they represent under the First Amendment and the due process clause and the equal protection

clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §2000d, 42 U.S.C. §1981, 20 U.S.C. §1703, 29 U.S.C. §794, and 20 U.S.C. §1401 et seq.

2. A stipulation to certification as a class action.

3. The discontinuation of the current discipline procedures.

4. Disciplinary standards which set forth:

a. Specific definitions of offenses for which students may be disciplined.

b. The discipline which may be imposed for each offense, and, if more than one form of discipline can be imposed for a particular offense, the criteria for determining which form will be imposed.

c. Limitation on suspension or expulsion from the student's regular classroom program to those situations in which the student's conduct poses a continuing threat of physical danger to persons or serious disruption of the educational process which cannot be remedied by less restrictive means, such less restrictive means not to include corporal punishment; in no event shall suspension or expulsion exceed one semester.

d. Opportunities for students suspended or expelled from their regular classroom programs to make up, without academic penalty, all work missed during the exclusion period and to participate in alternative educational programs during the exclusion period, with provisions to insure that such programs are adequate in terms of staffing, curriculum, materials, and facilities; are free from racial discrimination in assignment and operation; and are not operated on a segregated or substantially racially disproportionate basis.

e. Specific limits on the conditions under which students shall be referred to the administration for disciplinary problems so that, wherever possible, such problems are resolved informally in the classroom.

f. Policies and procedures which prohibit all disciplinary exclusions by which handicapped students are excluded from their current education programs, are otherwise subjected to changes in their educational placement without complying with the requirements of federal law, or are otherwise denied their rights under federal law to a free appropriate public education in the least restrictive environment.

g. The rights of students to freedom of expression, privacy and non-discrimination.

5. Due process procedures for suspension, expulsion, and other serious forms of discipline, such procedures to include:

a. written notice to student and parent, sufficiently in advance of the hearing to allow adequate time for preparation, setting out in understandable language the specific charges, the evidence upon which they are based, the proposed disciplinary action, the nature of the proceedings, a full description of procedural rights, and sources of free or inexpensive representation;

b. provision for the student's continued attendance in his/her regular program pending the hearing, except in properly defined emergency circumstances;

c. access, prior to the hearing, to all the students records and to all evidence to be used against the student; (professional counselors at the school to see if they can resolve student problems).

d. hearing before an impartial student-staff tribunal; student shall have the right to challenge any one on the committee;

e. right to representation by counsel or other advocate;

f. right to choose open or closed hearing;

g. right to confront and cross-examine all adverse witnesses -- statements may not be used against the student unless those who made them testify and are present for the opportunity to cross-examine;

h. right of the parent and student to be present during the entire hearing, to testify, to present witnesses, and to submit evidence;

i. protection against self-incrimination;

j. presumption of innocence and no imposition of discipline without first finding, based on clear and convincing evidence, that the student is guilty of the charges;

k. written, reasonably detailed finding of fact, sent to student and parent;

l. right of the student to appeal to a biracial school appeals board consisting of equal numbers of students and staff;

m. expungement from the student's record of all information relating to the incident if the student is not found guilty of the charges.

6. Grievance Procedures which provide for:

a. informal resolution of problems, grievances, and complaints concerning any school-related matters (other than suspension, expulsion, and other serious forms of discipline handled by the due process procedures above);

b. presentation of such grievances, when not resolved informally, to the school appeals board (see 5(l) above), which shall have decision-making authority; and

c. ombudspersons, to be selected by students and parents, who will be trained to offer assistance to students and parents concerning their rights and to help students and parents obtain resolution of grievances.

7. Establishment of a student biracial council and a parent biracial council, together with other mechanisms for substantial student and parent participation. The functions of these groups will include addressing racial tensions and hostilities, fostering of communication within the student body and within the parent community, representation of student and parent concerns, and participation in all aspects of school affairs which affect students and parents. These groups will be autonomous and independent of school system control. The school system will provide full cooperation with these groups, including meeting spaces, allowing meetings of such student groups during the regular school day, access to needed information, and reasonable access to school media facilities (copying facilities, public address systems, etc.).

8. Provision for training concerning student discipline, student rights, non-discrimination, and implementation of the provisions of this decree, including:

a. a program of in-service training for faculty and administration;

b. a program of training and orientation for students, who will select the resources to provide the training and orientation;

c. a program of training and orientation for parents, who will select the resources to provide the training and orientation.

9. Provisions for relief for discipline previously imposed under the demerit system:

a. All students suspended or expelled from their regular programs under the demerit system who are still excluded from those programs will be reinstated immediately.

b. All students who have been excluded from their regular programs under the demerit system will be offered effective programs of compensatory education to make up all work and tests missed while excluded and to be placed in as good academic standing as if they had not been excluded. These students will be permitted to attend summer school at no charge.

c. All notations of alleged misconduct, demerits, suspensions, expulsions, or other disciplinary action under the demerit system shall be expunged from students' records.

d. Students who were suspended or expelled from their regular programs under the demerit system will be awarded $100 per day for each day of exclusion from ____________________.

10. Notification to all affected students and former students and their parents of this decree and of their rights hereunder. The provisions

referred to in paragraphs 4-7 above shall also be incorporated into a code of student rights and responsibilities which shall be distributed annually to all students, parents, and faculty.

11. A program for monitoring the implementation of this decree and for insuring that racial discrimination is eliminated from all aspects of the disciplinary process, including:

a. A parent/student monitoring committee, selected by the student and parent biracial councils, which shall have access to all needed information and other needed cooperation from the school system and shall make periodic reports concerning the status of implementation to the Court, with copies to plaintiffs' attorneys.

b. Monthly reports, compiled by school officials and filed with the Court, with copies to the monitoring committee and to the plaintiffs' attorneys. Such reports shall include (i) information concerning all teacher disciplinary referrals (regardless of whether discipline is ultimately imposed), disciplinary action taken, information concerning any hearing provided, the teacher or other person who made the initial referral, the race of the student, the handicap status of the student, and the alleged offense; (ii) similar information for drop-outs/withdrawals; (iii) reports on the status if implementation of each of the components of the decree.

c. Regular review by school officials of the monthly discipline reports, and, where the reports reveal continued racial disproportion in discipline, in-depth investigation of the sources of the disproportion and implementation of steps to remedy the disproportion.

12. Designation of one school official who will be responsible for overseeing implementation of the consent decree, making the school system's reports to the Court, and being available to counsel for the plaintiffs for consultation concerning implementation of the decree.

13. Provision that the Court will retain jurisdiction and that, one year after entry of the agreement, the Court will hold a hearing to determine the status of compliance and whether any further relief is necessary.

[Successful settlement can and should also include an award of attorneys' fees and costs to plaintiffs. See 42 U.S.C. §1988. Plaintiffs' attorneys, however, are under a duty to negotiate this separately and to refrain from discussing such fees during negotiation of substantive relief.]

2. SPECIFIC REMEDIES FOR WRONGFUL EXCLUSION

a. EXPUNGEMENT OF RECORDS

Courts which have found that students were excluded illegally have routinely granted requests that the school be ordered to expunge any evidence of the suspension or expulsion. See for example:

Pervis v. LaMarque Ind. Sch. Dist., 466 F.2d 1054, 1058 (5th Cir. 1972);
Fujishima v. Board of Ed., 460 F.2d 1355, 1359 (7th Cir. 1972);
McCluskey v. Board of Education, 662 F.2d 1263, 1264 (8th Cir. 1981), rev'd per curiam, 50 U.S.L.W. 3998.25 (7/2/82);
Dunn v. Tyler Ind.Sch.Dist., 327 F.Supp. 528, 536. (E.D. Tex. 1971), aff'd on this point, 460 F.2d 137, 146-147 (5th Cir. 1972) (violation of procedural due process);
Quarterman v. Byrd, 453 F.2d 54, 60-61 (4th Cir. 1971); (literature distribution);
Hatter v. Los Angeles City High Sch.Dist., 452 F.2d 673 (9th Cir. 1971)(symbolic expression)(expungement after student is reinstated);
Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975);
Smyth v. Lubbers, 398 F.Supp. 777 (W.D.Mich. 1975);
Dillon v. Pulaski County Special School District, 468 F.Supp. 54 (E.D.Ark. 1978), aff'd, 594 F.2d 699 (8th Cir. 1979) (procedural due process);
Montoya v. Sanger Unified School District, 502 F.Supp. 209, 213 (E.D.Cal. 1980).

The courts in Mills v. Board of Education, 348 F.Supp. 866, 883 (D.D.C. 1972), and Bradley v. Milliken, C.A. No. 35257 (E.D.Mich. 7/3/75), ordered that such provisions be included in system-wide discipline codes, requiring expungement whenever disciplinary action is found to be unwarranted through the codes' hearing procedures.

As the Supreme Court noted in Goss v. Lopez, 419 U.S. 565, 575 (1975), "If sustained and recorded, those charges [of misconduct punishable by suspensions of 10 days or less] could seriously damage the student's standing with their fellow pupils and their teachers as well as interefere with later opportunities for higher education and employment."

b. RIGHT TO MAKE-UP WORK AND ASSISTANCE

Courts have ordered schools to provide students with assistance necessary to help them catch up where the exclusion was determined to have been illegal. See, for example:

Shanley v. Northeast Independent School District, 462 F.2d 960, 967 (5th Cir. 1972);
Gonzales v. McEuen, 435 F.Supp. 460, 472 (C.D.Cal. 1977);
Jones v. Latexo Independent School District, 499 F.Supp. 223, 239-40 (E.D.Tex. 1980);
United States v. Wilcox County Board of Education, C.A.No. 3934-65-H (S.D.Ala., May 14, 1973);
Leibner v. Sharbaugh, C.A.No. 77-111-A (E.D.Va. Mar. 25, 1977) (Clearinghouse No. 21,631C) (order approving consent agreement) [see also opinion at 429 F.Supp. 744 (1977)];
Quarles v. Oxford Municipal Separate School District, C.A.No. WC-69-62K (N.D.Miss. 3/16/81) (Clearinghouse No. 2867D);
Sprague v. Harrison Community Schools, No. 80-005300-PZ (Mich. Cir.Ct., Clare County, 9/10/80) (Clearinghouse No. 29,225B) ("meaningful remedial and tutoring services" ordered for students who took "home passes" after losing course credit under illegal attendance policy; provision of academic credit to other students, who would have earned it but for the policy);
R.R. v. Board of Education of Shore Regional High School District, 263 A.2d 180 (N.J.Super.Ct. 1970).

More generally, the right to make up assignments and to not be penalized by grade reductions has frequently been granted by courts as a remedy where the exclusion has been found to be illegal.

See, for example:
Papish v. Board of Curators, 410 U.S. 667, 671 (1973);
Shanley, *supra*;
McCluskey v. Board of Education, 662 F.2d 1263, 1264 (8th Cir. 1981) (court simply ordered school to grant student academic credit for semester during which he was wrongfully expelled);
Gonzales, *supra*;
Jones, *supra*;
Wilcox County Board of Education, *supra*;
Taylor v. Grisham, C.A. No. A-75-CA-13 (W.D.Tex., Feb. 24, 1975) (Clearinghouse No. 15,925);
Leibner, *supra*;
Thomas v. Seal, C.A. No. 76-4-358 (Ala.Cir.Ct., Madison Co., Juv.Ct.Div., Preliminary Injunction, May 17, 1976) (Clearinghouse No. 19,517);
Brown v. Board of Education of Tipton County, C.A. No. 79-2234-M (W.D.Tenn. 3/30/79) (Clearinghouse No. 26,964A).

See also:
§VIII.C., "Academic Punishment (Grade Reductions, Etc.") for decisions holding that it is illegal to reduce grades or credit for absences, including absences during suspension, regardless of the legality of the suspension itself. (See especially §VIII.C.1.)
Cf.: §XIII.B.3 on the right to alternative education for excluded students.

c. DAMAGES

In *Wood v. Strickland*, 420 U.S. 308 (1975), the Supreme Court held that school officials do not have absolute immunity from damages when they violate students' constitutional rights in administering discipline:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under [42 U.S.C.] §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. [420 U.S. at 322]

In *Monell v. Department of Social Services of City of New York*, 98 S.Ct. 2018 (1979), the Court held that municipal entities (such as school boards) can be treated as "persons" under 42 U.S.C. §1983, and thus can be sued for damages for violation of constitutional rights, as can local officials "in their official capacity." The entity or person sued, however, must have in some way been responsible for the violation, and school boards will not automatically be held responsible for every action of their employees.

In *Owen v. City of Independence, Mo.*, 100 S.Ct. 1398 (1980), the Court held that, when municipal entities or officials in their "official capacity" are sued under §1983, they cannot claim the limited immunity which *Wood* provides for school officials sued in their "personal capacity." That is, where it can be demonstrated that a school board or school officials in their official capacity are responsible for a violation, they can be held liable for damages even if there was no bad faith and even if the law in that area was not well-settled -- e.g., even if there is no claim that they "knew" or "should have known" that the action was illegal.

In *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), the Court held that municipal entities are immune from *punitive* damages under §1983. Compare *Boyd v. Shawnee Mission Public Schools*, 522 F.Supp. 1115 (D.Kan. 1981) (school district not immune from punitive damages under §1981).

In *Carey v. Piphus*, 98 S.Ct. 1042 (1978), the Court held that the damages which a student may collect under §1983 for a violation of procedural due process may be limited if the school system can demonstrate that the student would have been suspended even if s/he had been given proper procedural due process. If the school does make such proof, the student then has an opportunity to show that s/he nevertheless suffered some additional injury as a result of the denial of due process (such as mental or emotional distress). If such additional injuries are not shown, the student will still be entitled to nominal damages (generally one dollar). Nominal damages may nevertheless be significant, since they will prevent a case from being dismissed when it might otherwise be moot (e.g., where the student has already returned to school). Also, award of damages will make the student the prevailing party, generally entitling him/her to attorney fees.

While the above cases provide the framework for bringing §1983 damage claims for violations of constitutional rights, the standards for damage claims for violation of statutory rights (such as the civil rights statutes discussed in §III) are less clear. First, it is not entirely clear whether the private cause of action implied in these statutes applies to damage actions as well as suits for injunctive relief. Compare *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979); with *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981). Second, it is not clear whether §1983, instead of (or in addition to) the statute itself, provides a private right of action for violations of these statutes. Compare *Maine v. Thiboutot*, 100 S.Ct. 2502 (1980); with *Pennhurst State School & Hospital v. Halderman*, 101 S.Ct. 1531, 1545 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers*, 101 S.Ct. 2615, 2626-27 (1981).

Students have been awarded damages in several other cases, including:

Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975)(student newspaper case, back pay and one dollar nominal damages);

Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978)(nominal damages for suspension without notice and hearing);

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 3015 (1981) (strip search);

Dillon v. Pulaski County Special School District, 468 F.Supp. 54 (E.D.Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979) (nominal damages for due process denial);

M.M. v. Anker, 477 F.Supp. 837 (E.D.N.Y.), *aff'd*, 607 F.2d 588 (2nd Cir. 1979)($7500 for strip search), see also the memorandum opinion on damages, C.A. No. 78-C-492 (4/24/79) (Clearinghouse No. 29,904A);

In re Cloud, No. 87399 (Minn.Dist.Ct., Hennepin County 1977) (Clearinghouse No. 18,666B)($500 for violation of state suspension law);

Henderson v. Van Buren Public Schools Superintendent, C.A. No. 7-70865 (E.D.Mich. 12/29/79)(upholding $100 verdict for one day suspension without due process);

Endress v. Brookdale Community Col., Civil No. C-160S-74 (N.J.Super.Ct., App.Div., 8/27/76)(ordering $10,000 in attorney fees, $2,500 in compensatory damages [for loss of one year's contract] and punitive damages of $2,500 for dismissal because of editorial she wrote for the student newspaper).

See: Williams v. Austin Independent School District, C.A. No. A-78-CA-215 (W.D.Tex. 8/26/81)(Clearinghouse No. 32,421)(even if later hearing cured defects in earlier hearing, student should still be allowed to present evidence that he suffered actual damages as a result of the denial of due process in the interim period, in addition to one dollar nominal damages).

See also cases in:

§VIII.B, "Corporal Punishment and Similar Abuses;"
§VI.D, "Tort Actions (Assault and Battery, Negligence, Etc.);"
§VI.E., "Contract."

B. ALTERNATIVES

In examining disciplinary "alternatives," certain distinctions should be kept in mind. Some alternatives are designed to be implemented once an act of misconduct occurs (e.g., conferences, time-out rooms). Others, mainly focused on changing the educational or institutional environment, are designed as preventive measures which will reduce the tendency for acts of misconduct to occur (e.g., curriculum improvement or student participation in decisionmaking). Still others change the rules of conduct themselves, so that behavior that was previously treated as disruptive is now permitted (e.g., dress rules or certain "movement offenses").

A somewhat different, but related distinction is the one between alternatives that assume that something is wrong and needs to be changed with the individual student and alternatives that assume that something is wrong and needs changing within the institution. The former, which tend to be far more prevalent, sometimes use "behavior modification" techniques whereby school officials decide on what behavior they want to encourage or discourage and then apply extrinsic rewards and/or punishments to students to produce the desired effects. The latter more often emphasize more participatory forms of joint student-staff analysis and problem-solving. [One book which focuses on this distinction and emphasizes the latter is Alfred S. Alschuler, School Discipline: A Socially Literate Solution (1980) (though note that the book deals mainly with teacher training in problem-solving and gives much less attention to involving students).]

The materials which follow are designed to present an overview. First, the suggestions by the National Education Association provide a wide array of mostly non-punitive alternatives, some of them designed as disciplinary responses and some as preventive institutional changes. (See also the remedies in §XIII.A.1.)

Second, the piece by Antoine Garibaldi describes the impetus for finding in-school alternatives to suspension and provides a somewhat critical review of the most common of these alternatives. (In particular, alternatives for dealing with "discipline problems" should not become a substitute for an overall educational program and a definition of institutional order which engage all students in responsible roles.)

Finally, there is a discussion of the possible legal bases for arguing that, once a student is excluded from his/her regular program, s/he should be provided with a suitable alternative form of education.

Because of the potential abuses of in-school suspension programs, it is preferable to view such programs as a form of suspension rather than as an alternative to suspension so that the substantive standards, procedural safeguards, record-keeping, and monitoring appropriate to other suspensions are applied. This can be done by defining suspension as exclusion from the student's regular program and then deciding what educational alternative should be offered to the suspended student. (See §§VIII.E and X.D.)

1. ALTERNATIVES PROPOSED BY THE NATIONAL EDUCATION ASSOCIATION

The following recommendations for short-, medium-, and long-range non-punitive approaches to discipline issues comes from the largest teachers' organization in the United States.

ALTERNATIVES RECOMMENDED BY THE NATIONAL EDUCATION ASSOCIATION

Short-Range Solutions

The first step that must be taken is the elimination of the use of punishment as a means of maintaining discipline. Then, the ideas below can be used as temporary measures to maintain discipline while longer-range programs are being put into effect.

1. Quiet places (corners, small rooms, retreats)
2. Student-teacher agreement on immediate alternatives
3. Teaming of adults-teachers, administrators, aides, volunteers (parents and others)—to take students aside when they are disruptive and listen to them, talk to them, and counsel them until periods of instability subside
4. Similar services for educators whose stamina is exhausted
5. Social workers, psychologists, and psychiatrists to work on a one-to-one basis with disruptive students or distraught teachers
6. Provision of alternate experiences for students who are bored, turned off, or otherwise unreceptive to particular educational experiences:
    - a. independent projects
    - b. listening and viewing experiences with technological learning devices
    - c. library research
    - d. work-study experience
7. In-service programs to help teachers and other school staff learn a variety of techniques for building better interpersonal relations between themselves and students and among students:
    - a. Class meetings (Glasser technique)
    - b. Role playing
    - c. Case study-what would you do?
    - d. Student-teacher human relations retreats and outings
    - e. Teacher (or other staff)—student-parent conferences
8. Class discussion—of natural consequences of good and bad behavior (not threats or promises); of what behavior is right; of what behavior achieves desired results; of causes of a "bad day" for the class
9. Privileges to bestow or withdraw
10. Approval or disapproval
11. Other staff members to work with a class whose teacher needs a break.

Intermediate-Range Solutions

1. Staff-student jointly developed discipline policy and procedures
2. Staff-student committee to implement discipline policy
3. Parent education programs in interpersonal relations
4. Staff in-service program on interpersonal relations, on understanding emotions, and on dealing with children when they are disruptive
5. Student human relations councils and grievance procedures
6. Training for students and teachers in crisis intervention
7. Training for students in student advocacy
8. Training for teachers in dealing with fear of physical violence
9. Regular opportunities for principals to experience classroom situations.

Long-Range Solutions in Schools

1. Full involvement of students in the decision-making process in the school
2. Curriculum content revision and expansion by students and staff to motivate student interest
3. Teacher in-service programs on new teaching strategies to maintain student interest
4. Alternate programs for students
5. Work-study programs
6. Drop-out—drop-back-in programs
7. Alternative schools within the public school system
8. Early entrance to college
9. Alternatives to formal program during last two years of high school
10. Few enough students per staff member that staff can really get to know students
11. Adequate professional specialists—psychiatrists, psychologists, social workers
12. Aides and technicians to carry out paraprofessional, clerical, and technical duties so that professional staff are free to work directly with students more of the time
13. A wide variety of learning materials and technological devices
14. Full implementation of the *Code of Student Rights*
15. Full implementation of NEA Resolution 71-12: "Student Involvement"—
    The National Education Association believes that genuine student involvement requires responsible student action which is possible if students are guaranteed certain basic rights, among which are the following: the right to free inquiry and expression; the right to due process; the right to freedom of association; the right to freedom of peaceful assembly and petition; the right to participate in the governance of the school, college and university; the right to freedom from discrimination; and the right to equal educational opportunity.

Long-Range Solutions With Other Agencies

1. Staff help from local and regional mental health and human relations agencies
2. More consultant staff to work with individual problem students
3. Long-range intensive in-service programs to prepare all staff to become counselors
4. Mass media presentations directed to both the public and the profession on the place of children in contemporary American society
5. Some educational experiences relocated in business, industry, and social agencies
6. Increased human relations training in preservice teacher education and specific preparation in constructive disciplinary procedures.

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2. In-school Alternatives to Suspension: Trendy Educational Innovations

Antoine M. Garibaldi

Recently, Mizell (1978) presented some of the essential ingredients for designing and implementing in-school alternatives to suspension. Unfortunately, though, many researchers are not aware of the widespread use of these alternatives to out-of-school suspension. Practitioners, on the other hand, are much more knowledgeable about these programs; and, contrary to popular belief, in-school alternatives to suspension are not new–some have been around for several years. Parents and educators have been alarmed by the increased attention that has been given to apparently excessive violence and vandalism by students (Safe School Study, 1978), the reported unscrupulous use of corporal punishment in schools (Wise, 1977; Hyman, McDowell & Raines, 1977), and the arbitrary use of suspensions and expulsions by administrators (Children's Defense Fund, 1975).

Since the Office for Civil Rights (OCR) first systematically collected data on suspensions and expulsions almost seven years ago, there have been many attempts to explain the data and recommend viable alternatives to putting children out of school. In-school alternatives to suspension, for the most part, have become the remedy for many school districts. This paper is based on a survey of these programs conducted by the author during the 1977-78 academic year while a fellow at the National Institute of Education. Its purpose is to highlight some of the salient features of the most-commonly used alternatives to suspension and elaborate more specifically on the concerns offered earlier by Mizell. However, recognition of the suspension problem in the nation's schools and its effects on students are necessary for understanding why these programs are being implemented.

This article is based on presentations delivered by the author at the National Institute of Education's conference on In-Sch School Alternatives to Suspension (April, 1978) and the annual conference of the National Association of School Psychologists (March, 1979). The views expressed are solely those of the author and do not reflect the opinions or policies of the National Institute of Education.

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THE SUSPENSION PROBLEM

Data collected by the OCR during the 1972-73 school year, and analyzed more closely by the Children's Defense Fund (CDF) in 1975, point to the severity of the suspension issue. One of the first things that hits the observer squarely in the eye when examining the results of the OCR survey is the tremendous impact that suspension has on nonwhite students. Of approximately 24 million students enrolled in the schools surveyed, almost 37,000 were expelled and slightly more than 930,000 were suspended at least once for an average of four days each. Nonwhite students comprised only 38 per-

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cent of the total enrollment but accounted for 43 percent of the expulsions, 49 percent of the suspensions (black students accounted for 47 percent), and more than half of the 3½ million days lost by suspension (CDF, 1975). Moreover, nonwhite students were suspended for an average of 4.3 days per suspension, compared to the 3.5 days for white students. The data also show other inequities in the disciplinary system.[1] These figures are certainly alarming, but it seems more appropriate to ask why are so many students, and especially nonwhite students, suspended and expelled.

Somewhat in response to the OCR and CDF analyses, the National Association of Secondary School Principals (NASSP) in 1975 surveyed a portion of its membership and asserted that suspensions were being used by principals as a "sanction of last resort." Although all of the school administrators queried stated that they "held conferences with students prior to suspension except in the most extraordinary circumstances," 86 percent indicated that they sent letters home, 73 percent said they used some form of student referral system, 46 percent used detentions, and 34 percent said they used in-school suspensions. Ninety-three percent also affirmed that students in their schools were given the opportunity to appeal adverse decisions. Given such a thorough consideration of out-of-school suspensions, one must ask whether administrators do dole out suspensions arbitrarily, unilaterally, and sometimes for nebulous reasons more often called "insubordination."[2]

THE EFFECTS OF SUSPENSION

Suspension may serve the needs of both students and educators when used properly. On the one hand, it offers a vehicle for the teacher or administrator to temporarily dismiss a misbehaving student from the classroom or school building. Suspension provides students with an opportunity to "cool off" and some time to consider the disruption that they have caused. These dual goals are not always remembered, though, because many students are sent home for problems that could have easily been solved by the teacher at school and because many suspensions are for truancy, tardiness, or cutting classes (CDF, 1975). Students are often the victims but do not always deserve the blame; because of their own frustrations, teachers easily fall into the trap of using suspensions as an expedient response to a problem that they do not want to or are unable to handle.

In short, out-of-school suspensions are most harmful to the student. Suspended students lose credit for missed schoolwork and valuable instruction time as well. They are often left unsupervised for the remainder of the day, because a large majority of parents today must work. There is the possibility that students will loiter and be susceptible to engaging in misdemeanors (e.g., shoplifting, disorderly conduct, or minor acts of vandalism). They are also likely to be castigated by their friends and stigmatized by their teachers. In addition, schools may suffer the loss of daily revenues if allocations are based on average daily attendance formulas.

THE UTILITY OF IN-SCHOOL ALTERNATIVES TO SUSPENSION

Given the preceding negative effects, it is likely that both schools and students can benefit tremendously from in-school alternatives to suspension. These programs are designed to keep students in school for the remainder of the day and provide them with academic instruction commensurate with that of their classmates. They also receive the necessary counseling to help them function better in the classroom and at school. No credit is lost because assignments are given by the students' teachers, and schools do not have to forfeit their daily revenues if attendance is used as the basis for that income.

VARIETIES OF IN-SCHOOL ALTERNATIVES TO SUSPENSIONS

In-school alternatives are not monolithic. There are as many types of programs as there are schools. However, there does appear to be a trend in that three common models are used most frequently. They are (1) time-out rooms, (2) in-school suspension centers, and (3) counseling/guidance programs. Categorically, the models are preventive and prescriptive in orientation and attempt to assist a student academically and/or behaviorally before the pupil engages in more serious infractions of school policy that might lead to permanent exclusion or a school transfer.

Time-out rooms are designed to do exactly what their labels suggest. Students are sent to a vacant classroom or room adjacent to the principal's office, where they are temporarily left unattended until a staff person inquires about the reason for their being sent. This person serves also as a facilitator between the student and the sending teacher in cases in which an interpersonal conflict has precipitated the referral. Students are usually referred for one class period, and no formal instruction takes place. However, the student is assigned work by the homeroom teacher, and the time-out room monitor assists the pupil if there are questions about the assigned work. In most cases, referral back to regular classes is determined by the assistant principal after careful deliberation with the monitor. An alternate possibility is that the monitor might help the student to draft a behavioral contract that commits the pupil to more positive behavior after returning to class. This agreement is signed in the presence of the teacher and sometimes by a parent.

Although the picture painted here is one that is positive, the fact is that many time-out rooms leave much to be desired. Some rooms are located in basements, dingy cellars, or remote areas of the school building where no interaction could conceivably occur. In such instances, a time-out room is no more than a detention center and takes on the characteristics of the corresponding intervention used often in clinical therapy.

In-school suspension centers differ from, and offer more extensive services than, time-out rooms. Placement is for longer periods (on the average three days), formal instruction is given, and the staff is larger (usually comprised of a counselor, a "master teacher," and a social worker). The additional staff in this model is the key factor that differentiates this program from all other types. If students are from the same grade, the master teacher can prepare daily lessons with the help of homeroom teachers in each of the students'

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subject areas. In the case of students from different grade levels, daily assignments are provided by each instructor and monitored by the master teacher, who helps the students when the academic material is not understood. An able teacher who is competent in many subjects plays a pivotal role in this type of program; students also benefit substantially from individualized attention. Though the counselor's role is self-explanatory, this person may supplement classroom activities by exposing students to audiovisual materials and games on decision making and values clarification, or by planning group guidance sessions that give the students an opportunity to vent their frustrations about the school or their own academic performance. These experiences may help to facilitate a more positive relationship between the sending teacher and the student in trouble. The social worker's role can be aptly defined as a liaison between the home and the school. The social worker formalizes contact between the parents of the referred student and the teachers and administrators of the school. Regular visits by the social worker are made to the parents at home or at work. This kind of rapport keeps students on guard, even though they know that the social worker is not a truant or probation officer. Needless to say, the staff of this type of program must be special people who possess (1) high tolerance levels, (2) unswerving commitment to the needs and problems of students, and (3) a certain savvy for working as "brokers" between students and school personnel. This is not easy, because they must take some risks–sometimes by suggesting that the teacher, rather than the student, might need help. With an average daily enrollment of 15 students, communication with all levels of the regular building staff can be exhausting. This level of interaction is essential, because reassignment to regular classes is a shared decision made by parents, administrators, teachers, and the in-school alternative staff.

The third common type of alternative to suspension is the guidance program. This supplemental counseling concept differs from time-out rooms and in-school centers in the sense that comparable facilities are not needed, and the amount of time spent by students is dependent upon the seriousness of the infraction (which determines the length of a daily or weekly counseling session). The program is based on the readiness of the students to see that their misbehavior has interfered with the classroom instruction of their peers. Depending upon the students' problems and the expertise of the counselors, interventions such as nondirective counseling, Glasser's reality therapy, transactional analysis, values clarification, or Kohlberg's moral reasoning model may be used. Since only one or two full-time persons are used in these programs, the services of graduate school interns in psychology, volunteer paracounselors, social workers from the community, and sometimes parents complement the staff. The referral process in these programs is less rigid than the other two previously discussed, and teachers, as well as parents, may suggest the assignment of students.

MISCELLANEOUS ALTERNATIVES

The three types of programs mentioned above are not the sole varieties of alternatives to suspension used in the schools today. The ingenuity of educators has fostered the use of ombudspersons, hall monitors and pupil-problem teams, the development of work-study programs, Saturday and evening schools, after-school detention centers and peer counseling programs, as well as the inclusion of "school survival" courses into the regular curriculum. As Mizell (1978) has implied, each district must select the program that is best for their students and within the budget set by the school board. Local districts can implement one or more of these programs with existing unassigned staff and with materials already available to the individual schools. Nevertheless, many of the alternatives existing today are supported totally or partially by a myriad of federal entitlements such as the Emergency School Assistance Act (ESAA), Vocational and Career Education Act, Titles IV-B and IV-C of the Elementary and Secondary Education Act (ESEA) that supplement counseling and guidance services, and the Law Enforcement Assistance Administration (LEAA). However, as Mizell (1978) has suggested, complete cooperation from the school board, local administrators, teachers, parents, and the community is fundamental to the success of the program's development and implementation.

DISCUSSION

In-school alternatives to suspension have been accepted as viable responses to precipitous rates of out-of-school suspension in nonviolent and more mild cases of misbehavior. But the ideal programs cited above might be the exception rather than the rule in many school districts. It is no secret that some teachers and administrators prefer not to contend with the "root problems" of student misbehavior, but rather develop programs as an immediate response to the offending behavior. This is not always the answer, because the problem might rest with the teacher's inability to manage the class. Likewise, assigning students to a basement or to sound-proof booths, as some schools do, is neither a humane nor a constructive way of helping them to modify their socially unacceptable behavior. Such examples demand speculation about the ultimate effects on students of these programs and their intended use by the school. Mizell (1978) has hinted at some of these problems when programs are not developed with caution, but there is a need to spell out some reservations more clearly.

First of all, in-school alternatives to suspension are not just another set of programs for the "disadvantaged"–which usually implies the nonwhite and poor members of the student body. The OCR and CDF surveys demonstrate that nonwhite, especially black, students are suspended disproportionately, for a longer period of time, and for less uniform reasons than white students. The concern is whether these types of programs are another way of pushing students out of the regular classroom. If the referral process is not well-defined, some teachers may use the alternative program instead of handling problems in the classroom. Though assignment may be temporary, the cumulative effects of stigma and lower self-esteem, together with a subjective view by the student that justice is not distributed equally might lead to (1) dropping out or eventual exclusion from school, (2) a potential label as juvenile delinquent, and possibly (3) another statistic in the already dismal teen-age unemployment pool. The recent Massachusetts Advocacy Center report (1978) showing the disproportionate number of minority students also being channeled into special education programs provides supportive evidence for this reservation about educational tracking.

Another directly related concern is whether the programs are student-oriented or designed to serve the administrative needs of the school. Too many "compensatory" programs posit that their *raison d'etre* is to supplement the learning activities of the student, when in fact the district has its own intentions of how the money will be spent. The enforcement of civil rights provisions by municipal courts and the federal government has frightened many educational agencies, because the excessive use of some measures (such as suspension) jeopardizes their eligibility for other federal funds. This is extremely important to the present discussion because many programs have the manifest and latent functions of reducing out-of-school suspension, despite the fact that students might be losing academic credit or instruction time. It is unclear how administrators operationalize this goal, because referrals to some alternative programs count as a formal suspension whereas some consider the referral merely as an alternative to temporary exclusion from school.

The restrictions placed on students in in-school suspension centers may also be prescriptive rather than punitive. If students eat lunch on a different schedule from their peers or are prohibited from participating in extracurricular activities, they should understand whether this is considered a punishment. Some positive reasons can be given, but staff should realize that fear and punishment alone will not bring about behavioral change. Honesty with the students will engender a more favorable relationship in the program. Moreover, any similarity to a "prison" atmosphere should be avoided because, some students interpret being escorted to the lavatories, which is done in some programs, as being tantamount to solitary confinement.

Another concern focuses on due process. Whether the student is formally suspended or assigned to the in-school alternative, parents should be notified immediately. Many advocates for student rights are fearful that these programs might be a mechanism for circumventing the usual process of a fair and impartial hearing. They are skeptical about short-term assignments of three days or less, because such a temporary placement may not require adherence to due-process procedures. Administrators, therefore, should exercise their rights not only with decisiveness but also with concern for parental responsibility.

Finally, in-school alternatives should not be seen as the answer to all classroom or discipline problems. Suspensions will be necessary sometimes, but the student should not always have to carry the burden. Many teachers need help with managing their classrooms, and they should seek out support staff such as school psychologists, counselors, and even their fellow teachers. In-service sessions on classroom management should be provided regularly for teachers. It is also important for students in their developmental stages to see that justice is doled out firmly and equitably. Double standards neither help students nor make students feel special. Thus, teachers should be sure that suspensions are not being administered discriminantly on the basis of students' social status, race, or academic aptitude. Consistency always should be the rule.

NOTES

1. The Children's Defense fund also points out that black students were suspended at twice the rates of whites overall, that black students at the secondary and elementary level were suspended three times as often as whites (12.8% vs. 4.1% at the secondary level, and 1.5% vs. .5% at the elementary level), and that black students were multiply suspended (i.e., three times or more) at a rate of 42% compared to 27% for white students.
2. "Insubordination" is a discretionary category generally used by teachers to refer students for suspension. Refusal to do homework or classwork, verbal assaults on teachers by students, and other types of misbehavior usually fall within this category.
3. Most of the extant literature on in-school alternatives to suspension provide descriptive information on individual programs (see *Suspensions and Expulsions: Current Trends in School Policies and Programs*, National School Public Relations Association, Arlington, Virginia, 1976; and the National Association of Secondary School Principals' *NASSP Bulletin*, January 1977).

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See also Merle McClung, "Alternatives to Disciplinary Exclusion from School," 20 Inequality in Education 58 (1975).

3. RIGHT TO EDUCATION FOR EXCLUDED STUDENTS

"6.5 When a student is suspended from regular school attendance for any period of time, the school authorities should provide the student with equivalent education during the period of the suspension.

"[Comment] A student's right to education, as described in the commentary to Standards 6.3-6.4 as a basis for limitations on excluding students from school, also forms the basis of this standard's requirement that school authorities provide alternate forms of education in the rare instances when a student is suspended from regular school attendance. A school system's obligation should not be viewed as discharged by exclusion of a student even in the case where some exclusion is necessary.

"This would appear to require a change from current practices in some school districts. The Dixwell Legal Rights Foundation, 'Report on School Suspensions in New Haven,' reported that of the suspended students it interviewed, 48 percent stayed home and played during their suspensions, 28 percent stayed home and studied, and 6 percent stayed home and worked."

Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, Standards Relating to Schools and Education, 136-37 (Tentative Draft, 1977).

In Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972), the court issued due process procedures which the district was required to use for all suspensions, transfers, and other exclusions from the regular program for more than two days. The court included requirements that any student so excluded must be provided with adequate and appropriate alternative education, including students excluded on an emergency basis pending hearings (882, 883). Further, the school system "shall bear the burden of proof as to . . . the alternative educational opportunity to be provided during any suspension" (882). The case was decided on equal protection and due process grounds, but the court did not specifically discuss its holding on this point.

See also Chicago Board of Education v. Terrile, 361 N.E.2d 778, 781-82 (Ill.App. 1977), where the court held that a student who was found guilty of habitual truancy was denied substantive due process when the school board committed her to a parental school without showing that such commitment was "the least restrictive viable alternative." The school board was required to show that: "(1) its existing less restrictive alternatives are not suitable to meet the particular needs of the habitual truant, and (2) confinement in a parental school is a suitable means to meet those needs."

The ability to argue that the excluded student is entitled to alternative education will be enhanced by the ability to claim that education is a "fundamental interest under the particular state's constitution. See §VI.C, "Equal Protection." Cf. Pacyna v. Board of Education, 204 N.W.2d 671, 674 (Wis. 1973) (overturning denial of admission to kindergarten): "Education is for all children and if a child is excluded because of immaturity or other reasons, his educational needs must be otherwise provided for by the state."

Some states now have statutes which specifically require that students excluded from their regular programs be provided with the opportunity for alternative education of some form. See, for example, New York Education Law §3214. In Turner v. Kowalski, 374 N.Y.S.2d 133 (N.Y.Sup.Ct., App.Div., 1975), a student suspended for five days who was provided with sufficient assignments to cover the suspension period claimed that the school was required to provide tutoring during the suspension period under the state law. The court found for the student, rejecting the claim that the law only required alternative instruction for exclusions of more than five days. Compare Abremski v. Southeastern School District Board of Directors, 421 A.2d 485, 488 (Pa.Comm.Ct. 1980) (home study program with weekly in-school counseling during forty-day expulsion sufficient under Pennsylvania law).

One group of students more clearly entitled to alternative appropriate education when excluded from their current programs is students who have been classified as handicapped (or who have special education evaluations or appeals pending) under the Education for All Handicapped Children Act (20 U.S.C. §1401 et seq.) -- assuming that the exclusion is permitted in the first place under the stringent standards of that act. See §III.C, "Discipline of Handicapped Students."

Further, it may be possible to argue that other students, who have never been evaluated or classified as handicapped, are nevertheless entitled to the protection of federal laws, on the theory that the school, in expelling the student, is treating him/her as if s/he had an impairment (e.g., an emotional disorder), thereby triggering the protection of Section 504 of the Rehabilitation Act (29 U.S.C. §794). Again, see §III.C.

Under some state handicapped laws, the definition of special needs includes categories such as "behavior disorder," social maladjustment," or "emotional disturbance." There again, the law may entitle some students facing disciplinary proceedings to appropriate education rather than exclusion, although the dangers of labeling a student should be carefully assessed before such a path is chosen. See §III.C.

Where schools do provide alternative education for students excluded from their regular programs, it is important to maintain a critical perspective toward those programs which unnecessarily isolate or regiment the student or which rest upon theories of "pupil management" which attempt to manipulate the student into certain attitudes or behaviors. For substantive challenges to such programs, see §VIII.D, "Disciplinary Transfer," and §VIII.E, "In-School Suspension." See also XIII.B.2 above for descriptive material on the trend toward in-school suspension programs.

For more extensive discussion of legal theories and other issues, see Merle McClung, "The Problem of the Due Process Exclusion: Do Schools Have a Continuing Obligation to Educate Children with Behavior Problems?," 3 Journal of Law and Education 491 (1974); and McClung, "Alternatives to Disciplinary Exclusion from School," 20 Inequality in Education 58 (1975). See also §VIII.A, "Exclusion (Suspension, Expulsion, Etc.)."

C. FILING ADMINISTRATIVE COMPLAINTS WITH THE OFFICE FOR CIVIL RIGHTS[1]

A written complaint may be filed with the appropriate regional office of the Office for Civil Rights in the federal Department of Education (OCR) to the effect that a recipient of federal funds is violating:

(1) Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, which prohibits discrimination on the basis of race or national origin (see §III.A, "Race and National Origin Discrimination");

(2) Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, which prohibits discrimination on the basis of sex (see §III.B, "Sex Discrimination:);

(3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which protects the rights of students who are handicapped, have records of being handicapped, or are regarded as being handicapped (see §III.C, "Discipline of Handicapped Students").

A complaint should (a) identify the person complaining by name and address; (b) generally identify or describe those injured by the alleged discrimination; and (c) identify the institution or individual alleged to have discriminated and the alleged discrimination in sufficient detail to inform OCR what occurred and when it occurred.[2]

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[1] Adapted from Center for Law and Education, Minimum Competency Testing: A Manual for Legal Services Programs, 60 (1979).

[2] OCR may also initiate an investigation of a recipient of federal funds on its own, for example, on the basis of statistical reports. This is called a compliance review. See 34 C.F.R. Part 100, §100.7(a).

The filing of administrative complaints with OCR has not been problem free. OCR's efforts have often been delayed and inadequate.[3] Another problem is the relief authorized by Title VI. OCR does not have a statutory basis for securing an order that an institution or agency provide relief to some individuals. Instead the ultimate relief which may be secured after notice, investigation, negotiation and hearing is termination of an institution's federal financial assistance. OCR may also proceed "by any other means authorized by law . . .," which includes referral of matters to the Department of Justice. See 42 U.S.C. §2000d-1 and 34 C.F.R. Part 100, §100.6-11. Relief for an individual(s) will occur in some instances by agreement between the institution and OCR, or more generally, by voluntary action due to OCR interest. Because fund termination, when it actually occurs, can work to the detriment of minority and poor people who benefit from federal programs, there has been a general reluctance to seek it. This fact, and the enforcement problems mentioned above, have, no doubt, substantially undermined the overall impact of these civil rights laws.

Nevertheless, there are two circumstances which will sometimes lead to a decision to file a complaint. First, the resources needed to move forward in another way (e.g., private litigation) might be unavailable. Second, one might find that in a particular OCR region, due to the strength of particular personnel, filing of an OCR complaint makes sense. In these instances, this effort might lead to prompt pressure on an agency, or a thorough public memorandum of findings, which would be helpful securing elimination of discrimination.

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[3] HEW has been held to have defaulted in its Title VI enforcement responsibilities and remedial orders entered. See, e.g., Adams v. Richardson, 480 F.2d 1159 (D.C.Cir., 1973), 391 F.Supp. 269 (D.D.C. 1975), 430 F.Supp. 118 (1977) (southern desegregation); Brown v. Weinberger 417 F.Supp. 1215 (D.D.C., 1976) (northern desegretation). In December 1977, a consent decree establishing overall enforcement standards was entered. See Adams v. Califano, C.A. No. 3095, D.D.C., Order, 12/29/77. A study of HEW's fulfillment of parallel responsibilities concerning sex discrimination under Title IX concluded: "By all evidence we could find, HEW had failed to fulfill its responsibility to enforce the law." See, project on Equal Education Rights, NOW Legal Defense and Education Fund, Stalled at the Start - Government Action on Sex Bias in the Schools, 1977-78, p. 5. In 1976, the Adams litigation was expanded to include the Title IX issues, originally brought as Women's Equity Action League v. Mathews, C.A. No. 74-1720. Adams v. Mathews, 536 F.2d 417 (D.C.Cir. 1976). The Title IX issues were addressed in the 1977 comprehensive decree. Ongoing problems, hearings, and negotiations in Adams continue.

(In the area of school discipline, OCR has never issued a policy statement setting standards for determining discrimination in discipline, despite the repeated statements of OCR officials of the need for it. The Center for Law and Education has copies of the proposed discrimination-in-discipline policy which the National Coalition of Advocates for Students submitted to OCR in 1978.)

Addresses of Regional Offices of Office for Civil Rights, Department of Education

REGION I: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
Office for Civil Rights
Department of Education
140 Federal Street, 14th Floor
Boston, Mass. 02110
(617) 223-4405

REGION II: New Jersey, New York, Puerto Rico, Virgin Islands
Office for Civil Rights
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D. WORKING WITH STUDENTS: TIPS FOR LEGAL SERVICES ADVOCATES

by Fran Smith

Why develop an effective student voice in addressing discipline problems?

Across the country, abuses in discipline exist. Abuses in discipline will never be eliminated until students are fully informed of their rights and take an active role in monitoring their school district's implementation of those rights.

School rules and discipline are of great interest to students. This could be the focus for developing active student roles in other school issues. Involving students in all aspects of school decision-making will greatly benefit their education and the entire school community. If students are involved in the writing of rules, they will understand why the rules are there and take ownership of them and be more apt to live by them. Relying on the internal school hierarchy to implement student rights and fair and equitable discipline practices is not enough -- the school hierarchy wants to keep control and feels threatened by empowered students Because students are in the schools, they are in an excellent position to monitor their administration's policies. Assisting students and providing them with training and ideas on monitoring can help eliminate abuses in discipline.

Don't expect the problems to be solved by negotiating a change in the schools or winning a court battle. Whether the solution is a new discipline procedure or the establishment of biracial councils, the change won't be very meaningful unless you have been working with students all along so that, when the school finally provides an opening for change, the students are invested in making it happen.

Why are outside advocates in a position to work with students on changing the system?

Many adults within the school system feel they cannot challenge their supervisors because of the risks involved. If you are not employed by the school system, you do not run the risk of losing your job. You are not aspiring to climb the bureacratic hierarchy, therefore you will not have to be concerned about your interests first when it comes time to speak out. In addition, your agency's reputation may protect active students from retaliation by the school.

What are some of the difficulties of organizing students?

Students feel powerless because they are at the bottom of the hierarchy. Their feeling powerless is constantly reinforced by the poor structure that operates in schools. They are rarely asked to be involved in making decisions, and people are always telling them what to do. Even when there are opportunities to make decisions, students don't recognize their own potential to be powerful. Student Council and other student groups exist, but mechanisms for real student involvement and empowerment are not there. Apathy stems from feeling powerless, ineffective, and unimportant.

Students are fragmented. There is little unity among them on a large scale. There are no provisions for working together for common goals. The schools train students to think about their individual interests, narrowly defined. Students are not trained to think about common interests or needs. The competitive nature of schooling reinforces this individual outlook. For example, if one student wants to take a computer science course and s/he is rejected, the student would probably be bumped out and try to get on a waiting list, instead of seeing how many other students also wanted that course and organizing to get another one offered.

Often students, especially those who have never been involved in any student organization, lack confidence. They feel they cannot make any meaningful contributions to the school community or to other students because they are not experts. This feeling is constantly reinforced through their interactions with professional educators who often times treat them as if they know nothing.

Students have ideas about leaders that often prevent them from becoming involved. They think leaders are born, not made. They believe only very special people can become leaders and that they themselves don't possess that ability. This feeling prevents the shy student from becoming involved.

Another problem you will encounter is that students have demands on their time: jobs after school, family obligations and other major responsibilities. Seeking money to pay student advocates might enable more class diversity.

What are the challenges of being an advocate?

It's important to explain to students what you are all about and what role you will have in working with them. Good advocates must be useful and supportive. To achieve this, keep the following in mind:

1. Assist students in developing their strengths and dealing with their weaknesses.

2. Provide information and technical assistance about the issues they are interested in.

3. Help them set their goals and strategies.

4. Identify and refer them to helpful people and agencies.

Advocates can provide a broad perspective on what real goals are beyond just doing immediate activities. For instance, they can assist students in analyzing the situation so students will have a better understanding of how to deal with the issues. This can be done by helping them:

1. define the problems;
2. choose a goal;
3. match the goal with the strategies.

Schools do not train students to think that way or to take their own ideas seriously. When problems do get discussed in classes, it's often only on a superficial level, moving quickly to another topic, without a solution. Sometimes activities are discussed but very rarely is there a connection made to the initial problems raised, nor is there follow-up or analysis to see if the activities have affected the initial problems.

Let's take an example. Students are upset about the replacement of their acting principal. They are angry and have a sit in. They want to let the administration know they're angry, but at the same time some want to find out how a new principal is chosen and whether students had a say in it. An advocate can help find those answers. But beyond that you can provide an analysis of how their immediate problem fits into a larger issue and can be a strategy towards some long-range goals.

Advocates should try to enhance students' political education. This can be done by pointing out how change occurs, drawing on past struggles people in America have waged -- for example, anti-war movements, black liberation, or school desegregation.

As students begin to challenge the power structure, they will encounter many obstacles and attitudes from the administration. You may want to raise questions about those obstacles. For example: Why do the schools operate the way they do? Are all students receiving quality education? Are students involved in decisions? Do they have any power? Aren't they the consumers of education and shouldn't the school committee be accountable to students and parents? Can organized students be powerful and impact the system? In an age where everything happens so quickly it's important to point out that social change doesn't occur overnight, nor has technology been able to advance it!

Advocates have usually developed some organizing or leadership skills. Do not do for students what they can learn to do for themselves, for example, producing a leaflet, making phone calls, and setting up interviews. Provide them with the skills that are necessary to do these tasks.

Sharing responsibilites and tasks is important, because otherwise members of the group will feel they are not needed. Also, having 15 people who know how to write a petition is better than having only one person know. It is important for students to learn skills. Usually the most articulate student is chosen to represent the group. It is important that all members of the group learn good speaking skills. Relying on one member does not promote the group's growth. Help student leaders train their own membership to be leaders. Never speak on behalf of students. Assist them in developing their own voices.

Don't fall prey to unconscious sabotage. Because adults are older and most times in a position of controlling young people, it's hard for advocates not to do the same. Some ways to avoid this are:

1. Let the students do their own tasks.
2. Avoid using your own hidden agenda.
3. Be a facilitator, not the leader.
4. Don't hide who you are or what you stand for.

Often times when adults, especially from outside the system, are working with student organizers the school department will criticize your role. They may at times accuse you of being an outside agitator and putting the students up to it. They may also try to discredit the student's accomplishments.

A good example of the school committee attempting to discredit students' work occurred during a school committee meeting in Boston. Students were reading their position on a proposed discipline code. They had gotten a number of advocacy groups to endorse it. One school committee member asked if one of the advocacy groups had written the students' prepared statement. This question insulted the students' hard work. Be prepared to deal with those attitudes and prepare the students for them.

How do advocates hook up with students?

Whenever students are unhappy, upset or angry about a policy or issue, you can use this time to make contact with them. Students will react to severe situations concerning racist violence or an unexpected change in policy or staff. An advocate can be really helpful at that time. Students will need some assistance in figuring out goals and strategies.

Check out existing student groups and see what their issues are. Bring together students from different in-school groups. Unite as an independent organization to provide more autonomy. This may be especially important if the administration tries to control existing student groups. Parents are another way to hook up with students. Parents and students working together can be more powerful. At the same time, students need time to get together amongst themselves.

Check out community and church organizations that have contact with students.

Another way to hook up with students is to find progressive adults in the schools who work with students, but keep in mind that adults within the system aren't always able to serve the students' best interests.

* * * * * *

It's important to always process what's happening to students while they are organizing. Remember to relate their happenings to the larger perspectives on change and struggle. Help them analyze where the school system is coming from, constantly asking questions.

Fran Smith has been actively working with high school students around student rights, special education and other issues throughout her high school and college career.

XIV. THE LEGAL RIGHTS OF STUDENTS IN PRIVATE SCHOOLS

The discussion of case law in this book's commentary is directly applicable to students in public schools. This is so because most of that case law revolves around the Fourteenth Amendment to the United States Constitution, together with the other amendments in the Bill of Rights. On their face, these amendments protect citizens (including students) against action by the state which deprives them of due process, equal protection, rights of free expression, and privacy. It is clear that public schools and their employees (when acting in their official capacity) are "the state" for purposes of the Constitution. See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

The application of these constitutional rights, or analogous rights, to private school students is unclear at best. There are three basic theories which attempt to justify the application of such rights to private school students: (1) attempts to treat the action in question of the private school as "state action" under the Constitution; (2) contract theories under which the school has, through written or unwritten agreements, bound itself to recognize certain rights of the student; and (3) common law rights theories concerning private associations. Case law dealing with each theory has not been extensive and is still developing, but thus far the school has prevailed somewhat more often than the student.

These three theories are fully discussed in Center for Law and Education, The Constitutional Rights of Students, "Rights of Students in Private Schools," 365-74 (1976). Below is a brief summary of those theories, a list of more recent cases, and reference to other theories, including those based upon federal legislation.

Even where, in the eyes of the courts, private schools are not legally viewed as arms of "the state" which are bound by the Constitution, there are ample policy reasons for private schools voluntarily to recognize analogous rights for their students. Students in such institutions face organizational structures, processes, and rules which are often quite similar in their most basic aspects to those of public schools and which can have very similar effects upon those students. Moreover, the basic principles of human rights reflected in the legal rights to fair treatment, to free expression, and to privacy should not be ignored by any institutions, particularly institutions dedicated to education.

A. The State Action Theory

Under this theory, an attempt is made to show that the contested action of the private school is in some way "state action," thus requiring the protection of the Constitution.

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1. The State Involvement Theory

Under this branch of the state action theory, there must be demonstrated a connection between the challenged action and government involvement in the school. The mere fact of state regulation or state aid to the school is generally not enough.

The showing can be made in one of two ways. Under the first, it must be shown that the government regulation, aid, or other involvement is sufficiently connected to, or shares direct responsibility for, the particular challenged activity. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Under the second, alternative method, government involvement in the particular activity of the school need not be shown if it can be demonstrated that there is such a close and substantial relationship with the state in general that the actions of the school and the actions of the state are substantially intertwined enough to regard the school as a whole as acting for, or under the control of, the state. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Courts sometimes employ a balancing test, weighing the harm of government support for offensive activities against the harm of applying uniform standards to essentially private activity. The balancing thus involves an assessment of the actual degree of government support of the questioned activity, the extent to which the school is really private, and the importance of the right being asserted. See, e.g., Weise v. Syracuse University, 522 F.2d 397, 403-08 (2nd Cir. 1975) (reversing dismissal on state action grounds and remanding for hearing on the issue).

As this book went to press, the Supreme Court found an absence of state action in the discharge of teachers by a private school. Rendell-Baker v. Kohn, ____ S.Ct. ____, 50 U.S.L.W. 4825 (6/24/82). The school received virtually all of its money from public funds; virtually all students attending had been placed there by state and local public systems under contract in order to provide them with the special education mandated for them by state and federal laws; and the private school was heavily regulated in order to carry out this mandate. Nevertheless, the Court found that the specific actions at issue -- the firings, which the teachers alleged were for protected speech -- were not "fairly attributable to the state." (4828) The Court emphasized that the extensive regulation of the school had not extended to personnel matters. The Court also gave a very narrow reading to Burton. While the case may pose additional obstacles to state action claims on behalf of students, however, a different result might have been obtained if the case had involved student claims concerning the provision of the education which had been funded and regulated by the state. Compare Ross v. Allen, infra.

Additional recent cases finding sufficient evidence of state action include:

Howard University v. N.C.A.A., 510 F.2d 213 (D.C.Cir. 1975) (athletic association's action against private university and student held state action because public universities provided most of the association's financial support and had dominant role in determining its actions).

Braden v. University of Pittsburgh, 392 F.Supp. 118 (W.D.Pa. 1975), aff'd, 552 F.2d 948 (3rd Cir. 1977) (school's allegedly discriminatory action against employee held state action).

Taylor v. Maryland School for the Blind, 409 F.Supp. 148 (D.Md.), aff'd, 542 F.2d 1169 (4th Cir. 1976).

Chabert v. Louisiana High School Athletic Association, 323 So.2d 774 (La. 1975) (association's rule determining private school student's athletic eligibility held state action).

Cf. Rivas Tenorio v. Liga Athletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977).

Cf. Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied, 99 S.Ct. 278 (1978) (hospital considered a "state actor," relying on Burton, supra).

Cf. Benner v. Oswald, 444 F.Supp. 545, 556-58 (M.D.Pa. 1978) (Pennsylvania State University's actions are state actions).

Cf. Bishop v. Starkville Academy, 442 F.Supp. 1176 (N.D.Miss. 1977) (holding state, as distinct from private school, responsible for improperly aiding private discrimination by providing tuition assistance for special education students to racially discriminatory private school).

Cf. Ross v. Allen, 515 F.Supp. 972 (S.D.N.Y. 1981) (dismissal of school psychologist from private school for handicapped children operating under state contract, allegedly in retaliation for her reporting violations of handicapped laws in treatment of students, may be state action; lower court opinion in Rendell-Baker, supra, distinguished).

Cf. Abbariao v. Hamline University School of Law, 258 N.W.2d 108, 111-12 (Minn. 1977).

Additional cases finding insufficient evidence of state action:

Cohen v. Illinois Institute of Technology, 581 F.2d 618 (7th Cir. 1978), cert. denied, 99 S.Ct. 1058 (1979).

Williams v. Howard University, 528 F.2d 658 (D.C.Cir. 1976) (substantial federal funding insufficient to establish state action on due process claim but sufficient on racial discrimination claim, although appellant failed to prove racial discrimination).

Rogers v. Board of Trustees of McKendree College, 534 F.2d 330 (7th Cir.), cert. denied, 97 S.Ct. 100 (1976).

Berrios v. Inter American University, 535 F.2d 1330 (1st Cir. 1976).

Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977).

Rice v. Presidents and Fellows of Harvard University, 663 F.2d 336, 337-38 (1st Cir. 1981).

Lamb v. Rantoul, 561 F.2d 409 (1st Cir. 1977).

Winse v. Pace College, 394 F.Supp. (S.D.N.Y. 1975).

Donnelly v. Boston College, 401 F.Supp. 1 (D.Mass. 1975), aff'd, 558 F.2d 634 (1st Cur. 1977), cert. denied, 98 S.Ct. 618 (1978).

Cannon v. University of Chicago, 406 F.Supp. 1257 (N.D.Ill. 1976), aff'd, 559 F.2d 1063 (7th Cir. 1977) (on rehearsing), rev'd on other grounds, 99 S.Ct. 1946 (1979).

Sament v. Hahneman Medical College and Hospital of Philadelphia, 413 F.Supp. 434 (E.D.Pa. 1976), aff'd, 547 F.2d 1164 (3rd Cir. 1977).

Sanford v. Howard University, 415 F.Supp. 23 (D.D.C. 1976), aff'd, 549 F.2d 830 (D.C.Cir. 1977).
Marlboro Corp. v. Association of Independent Colleges and Schools, 416 F.Supp. 958 (D.Mass. 1976), aff'd, 556 F.2d 78 (1st Cir. 1977).
Wisch v. Sanford School, Inc., 420 F.Supp. 1310 (D.Del. 1976).
Giles v. Howard University, 428 F.Supp. 603 (D.D.C. 1977).
Stewart v. New York University, 430 F.Supp. 1305 (S.D.N.Y. 1976).
Lorentzen v. Boston College, 440 F.Supp. 464 (D.Mass. 1977), aff'd, 577 F.2d 720 (1st Cir. 1978), cert. denied, 99 S.Ct. 1254 (1979).
Huff v. Notre Dame High School of West Haven, 456 F.Supp. 1145 (D.Conn. 1978).
Naranjo v. Alverno College, 487 F.Supp. 635 (E.D.Wis. 1980).
Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973 (Sup.Ct., Tompkins County, 1975).
Miller v. Long Island University, 380 N.Y.S.2d 917 (Sup.Ct., Kings County, 1976).

2. The Public Function Theory

A related attempt to treat the acts of private schools as state action is found in the argument that the school performs the "public function" of education. This argument must confront the counter argument that viewing private schools in this way will undermine the value of maintaining a private sector in education. For some courts, it must be shown that the school is acting as a surrogate for the state. The strength of this argument will also vary depending upon the particular state's pronouncements, in its constitution and statutes, regarding education. The argument may be more persuasive in regard to elementary and secondary education, which is compulsory.

In Rendell-Baker, supra, 50 U.S.L.W. at 4829, the Court, however, rejected the teachers' "public function" argument, citing the standard to be whether the function has been "traditionally the exclusive prerogative of the State" and finding that education of emotionally disturbed high school students has not been.

Additional cases accepting the public function theory:

Evans v. Newton, 382 U.S. 296 (1966).
Sturm v. Trustees of Boston University, Equity No. 89433 (Mass. Super Ct., Suffolk County, 1969) (procedural due process).

Additional cases rejecting the public function theory:

Weise v. Syracuse University, 522 F.2d 397, 404 n.6 (2nd Cir. 1975).
Berrios v. Inter American University, 535 F.2d 1330 (1st Cir. 1976).
Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977).
Stewart v. New York University, 430 F.Supp. 1305 (S.D.N.Y. 1976).
Lorentzen v. Boston College, supra.
Cf. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-54 (1975), and dissenting opinion at 371-72 (private utility does not perform a "public function" -- not an action "traditionally associated with sovereignty," nor a service which the state is required by law to provide).

For earlier state action cases, see The Constitutional Rights of Students, supra.

In some states it may be easier to apply the state constitution to private schools. See State v. Schmid, 423 A.2d 615 (N.J. 1980), appeal dismissed, 102 S.Ct. 867 (1982) (Princeton University's regulations concerning literature distribution by non-students violated state constitutional rights of free speech and assembly).

B. The Contract Theory

It is widely accepted that the relationship between the student and the private school is contractual in nature, and that the school cannot take action which breaches the student's contractual rights. The contractual terms involved may be explicit, such as statements in published catalogues, regulations, etc., in effect at the time the student enters. They may also be implicit, as when it is argued that, so long as the student meets his/her contractual obligations, the school has a contractual obligation not to exclude him/her. The school may, however, be able to point to a broad "reservation clause," in which the student or parent has signed an agreement that the school reserves the right to exclude the student at any time for any reason. Doctrines of contract law would seem to allow students to argue that such reservation clauses should not be enforced because they are unconscionable or unreasonable, thus contrary to public policy, or that they are the result of "adhesion" contracts, in which the bargaining power of the school and the student are too unequal. This issue, however, has not been widely addressed.

An extensive list of contract cases involving private school students can be found in §VI.E, "Contract."

C. The Common Law Rights Theory

Under the English common law tradition, applied in part by American courts, members of private associations have certain rights to "natural justice," including protection against arbitrary expulsion and right to notice and hearing concerning expulsion. These rights have developed in part to protect the individual's valuable personal relationship to the association and the status which the relationship confers. This theory is sometimes related to tort actions (see below). While the case law is not extensive, the application of these rights to private school students has been recognized and discussed in:

Clayton v. Board of Trustees, 519 F.Supp. 802 (D.N.J. 1981) (theory makes school responsible for following its rules in disciplinary proceedings).

Abbariao v. Hamline University School of Law, 258 N.W.2d 108, 112-13 (Minn. 1977) (duty not to expel arbitrarily).

Cf. Tedeschi v. Wagner College, 427 N.Y.S.2d 760, 764 (1980) (one possible basis for court's holding that school must substantially follow its own suspension and expulsion procedures).

D. Right to Fair Treatment -- Theory Unclear

Some courts have stated that a private school student is entitled to fair treatment, without indicating whether the right derives from contract law, common law, or perhaps the public function theory:

Marlboro Corp. v. Association of Independent Colleges, 416 F.Supp. 958 (D.Mass. 1976), aff'd, 556 F.2d 78 (1st Cir. 1977) ("Private associations like defendant are 'quasi-public' and must follow fair procedures reasonably related to their legitimate purposes;" they must not act arbitrarily or without appropriate procedural due process; defendant met standards here, however).

Valvo v. University of Southern California, 136 Cal.Rptr. 865 (Cal.App. 1977) (dismissal of medical student may be set aside by court "if such dismissal was arbitrary, capricious, or in bad faith").

Flint v. St. Augustine High School, 323 So.2d 229 (La.Ct.App., 4th Cir., 1975) (disciplinary action will be upheld so long as there is "color of due process," as there was here; theory unclear).

In re Press, 45 U.S.L.W. 2237 (N.Y.Sup.Ct., N.Y. County, Oct. 27, 1976) (private colleges are "bound to accord uniform treatment to all candidates for a degree, pursuant to rules administered in a reasonable manner").

Tedeschi v. Wagner College, supra.

E. Federal Legislation Applicable to Private Schools

1. 42 United States Code Sec. 1981

This act, part of the 1866 Civil Rights Act, declares,

> All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .

The Supreme Court has held that the act prohibits non-sectarian, commercially operated private schools from refusing admission to prospective students because they are black. Runyon v. McCrary, 96 S.Ct. 2586 (1976).

Other cases addressing claims under Sec. 1981 include:

Gonzales v. Southern Methodist University, 536 F.2d 1071 (5th Cir. 1976) (Sec. 1981 would be applicable if plaintiff had established discrimination in admissions).

Riley v. Adirondack Southern School for Girls, 541 F.2d 1124 (5th Cir. 1976) (en banc) (dismissal of Sec. 1981 action reversed, citing Runyon v. McCrary, supra).

Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (en banc, 13 judges), cert. denied, 98 S.Ct. 1235 (1978) (refusal of church-related school to enroll black students on the basis of their race violated Sec. 1981; six judges affirmed the lower court's finding that the exclusion was based upon a social policy or philosophy, and not upon religious beliefs protected by the First Amendment, while a seventh judge voted to uphold the finding of discrimination on the grounds that, although he viewed exclusionary views as "religious," the free exercise of religion interests were outweighed by the interests "in eradicating the badges of slavery"; see also 581 F.2d 472 (1978).

Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (violation of the statute to expel two white students, one for dating a black student and both for their father's contacting the NAACP to complain; school's free exercise of religion claim rejected; white persons can sue under the statute).

Stewart v. New York University, 430 F.Supp. 1305 (S.D.N.Y. 1976) (white person can sue under Sec. 1981, but plaintiff here fails to state a claim).

Williams v. Northfield Mount Hermon School, 504 F.Supp. 1319 (D.Mass. 1981) (no showing that school failed to comply with disciplinary procedures, nor how, if it did so, this in any way affected §1981 rights under "contract" portion of act; other portion of act, dealing with "like penalties" held to require showing of state action, unlike the "contract" portion).

2. Requirements as Conditions of Accepting Federal Money

Certain federal legislation states that institutions which receive federal funds must comply with certain conditions. This legislation gives particular rights to students in private schools which accept such funds, and there is no "state action" requirement. Examples include:

a. Race, Color, and National Origin Discrimination. Title VI of the 1964 Civil Rights Act, 20 U.S.C. Sec. 2000d forbids discrimination, exclusion, or denial of benefits on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. (See §III.A, "Race and National Origin Discrimination.")

b. Sex Discrimination. Title IX of the 1972 Education Amendments, 20 U.S.C. Sec. 1681, forbids exclusion, discrimination, or denial of benefits on the basis of sex in any education program or activity receiving federal financial assistance (with certain narrow exceptions). The Department of Education has issued regulations, 34 C.F.R. Part 106. (See §III.B, "Sex Discrimination;" §VII.C, "Marriage, Parenthood, Pregnancy;" §VII.A, "Dress and Grooming.")

c. Discrimination on the Basis of Handicap. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, forbids exclusion, discrimination, or denial of benefits solely on the basis of handicap in any program or activity receiving federal financial assistance. Department of Education regulations appear at 34 C.F.R. Part 104. (See §III.C, "Discipline of Handicapped Students.")

d. Student Records. The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sec. 1232g, provides students and parents with a set of rights concerning student records kept by educational institutions to which federal funds are made available under programs administered by the United States Secretary of Education. Department of Education regulations appear at 34 C.F.R. Part 99. (See §XII.A, "Student Records.")

3. The Education for All Handicapped Children Act

In addition to protection against non-discrimination solely on the basis of handicap under Section 504 of the Rehabilitation Act of 1973 (see 2.c above), handicapped students in private schools have certain rights under the federal Education for All Handicapped Children Act (P.L. 94-142), 20 U.S.C. Sec. 1401 et seq., and the accompanying regulations, 34 C.F.R. Part 300. See especially 34 C.F.R. Sec. 300.400-460. Sec. 300.401 provides that handicapped children placed in or referred to a private school or facility by a public agency must be provided, at no cost to parents, with special education and related services in accordance with the law's general requirements for individualized education programs, that such private schools and facilities meet the standards applicable to state and local educational agencies (including the requirements of the Education for All Handicapped Children Act), and that such handicapped children have all the rights of handicapped children served by public agencies (presumably including rights of free expression, due process, privacy, etc.). For other handicapped children, who are in private schools without placement by a public agency, Sec. 300.450-460 require state and local agencies to provide special education and services. (See §III.C.)

Rendell-Baker, supra, has no bearing on the ability of private school students to assert the rights discussed here. That case dealt with "state action" for purposes of asserting constitutional rights. The Act here provides statutory rights independent of any state action.

4. Tax Exemptions for Private Schools

In order to obtain tax exemptions as non-profit institutions under the Internal Revenue Code, private schools must be able to show that their programs and facilities are operated in a racially nondiscriminatory manner. The dimensions of this obligation are discussed in:

IRS Rev.Proc. 75-50, 1975-2 Cum.Bull. 587; Rev.Rul. 75-231, 1975-1 Cum.Bull. 158;
Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970);
Green v. Connally, 330 F.Supp. 1150 (1981), aff'd, sub nom. Coit v. Green, 404 U.S. 997 (1971) (per curiam);
Bob Jones University v. Simon, 416 U.S. 725 (1974);
Bob Jones University v. United States, 639 F.2d 147 (4th Cir.), cert. granted, 102 S.Ct. 386 (1981);
Goldsboro Christian Schools, Inc. v. United States, 644 F.2d 879 (4th Cir.), cert. granted, 102 S.Ct. 386 (1981);
Wright v. Regan, 656 F.2d 820 (D.C.Cir. 1981) (appeal pending);
Moton v. Lambert, 508 F.Supp. 367 (5th Cir. 1981);
Jeffrey Howard Orleans and Elizabeth Dale Johnson, "Nondiscrimination Doesn't Have to Not Work: Restricted Scholarships, H.E.W., and I.R.S.," 7 Journal of Law and Education 493 (1978);
Note, "The Judical Role in Attacking Racial Discrimination in Tax-Exempt Private Schools," 93 Harv.L.Rev. 378 (1979).

F. Tort Law

Where other theories, including "state action" theories, are not applicable, the student may attempt to take legal action against a private school on the same basis as other private persons sue each other. In addition to suits for breach of contract, discussed under part B. above, this includes tort actions -- suits for certain wrongful acts (other than breach of contract). Among the torts recognized by most courts are negligence, civil assault and battery, false imprisonment, defamation, invasion of right to common law privacy, and fraud. See §VI.D, "Tort Actions."

Further Commentary

In addition to The Constitutional Rights of Students, other articles on the rights of private school students include: Note, "Private Government on the Campus -- Judicial Review of Student Expulsions," 72 Yale L. J. 1362 (1963); Wilkinson & Rolapp, "Private Colleges and Student Discipline," 56 A.B.A. J. 121 (1970); Note, "An Overview: The Private University and Due Process," 1970 Duke L. J. 795 (1970); O'Neil, "Private Universities and Public Law," 19 Buffalo L. Rev. 155 (1970); Hendrickson, "'State Action' and Private Higher Education," 2 J. Law & Ed. 53 (1973); Note, "Common Law Rights for Private University Students: Beyond the State Action Principle," 84 Yale L. J. 120 (1974); Note, "State Action: Theories for Applying Constitutional Restrictions to Private Activity," 74 Colum. L. Rev. 656 (1974); Orleans and Johnson, supra.

SUMMARY

XV. SUMMARY (A SHORT GUIDE FROM ONE STATE)

The material which follows is excerpted from the Massachusetts Department of Education's student rights and responsibilities handbook, written by high school students and recent graduates. It is included here for two purposes.

First, it provides a reasonably accurate "short-form" summary of some of the key issues covered in this manual and is organized in a somewhat similar manner. It can thus be used as an overview or a review.

Second, advocates often need material suitable for sharing with a wider audience of students, parents, and others. The Massachusetts handbook strikes a better balance than most between brevity and specificity.

CHECK IT OUT:

A GUIDE TO RIGHTS AND RESPONSIBILITIES FOR MASSACHUSETTS STUDENTS

A SHORT GUIDE FROM ONE STATE
ON STUDENT RIGHTS
AND SCHOOL DISCIPLINE

Excerpts from a student rights and responsibilities handbook for Massachusetts are provided here as a "short-form" guide to some of the more important aspects of student rights and school discipline.

The handbook, Check it Out: A Guide to Rights and Responsibilites for Massachusetts Students (Massachusetts Department of Education, 1980), was written by high school students and recent graduates affiliated with the Student Service Center, a student-run information center in the Massachusetts Department of Education. The Center for Law and Education is grateful to the Bureau of Student Services, Massachusetts Department of Education, for permission to reprint these excerpts.

Portions of the manual relating primarily to non-discipline issues or to Massachusetts-specific laws have been omitted (e.g., equal educational opportunity, school fees, school meals). Also omitted are sections on strategies for addressing violations of student rights (researching, choosing a goal, using conventional channels, organizing support, getting outside help, using the media) and resources (organizations, publications, legal references). Copies of the complete handbook are available from the Student Service Center, Massachusetts Department of Education, 31 St. James Ave., Boston, MA 02116.

Footnotes have been added by the Center for Law and Education where clarification is needed or where the law in other states may vary significantly from Massachusetts.

A. FREEDOM OF EXPRESSION

The First Amendment to the U.S. Constitution:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

General Principles

The First Amendment to the U.S. Constitution protects every student's freedom of expression in schools. You are free to express any ideas in any way you see fit, subject only to certain narrow restrictions on the content of what you say and on the time, place, and manner in which you say it. *Content* restrictions may include obscenity, defamation, and fighting words or incitement, if they are properly defined (see below). *Time*, *place*, and *manner* restrictions may include forbidding you from expressing yourself at those times or places or through those methods which substantially disrupt the educational process (see Disruption, p.2). School officials may not prevent you from expressing an idea simply because they do not like or agree with the idea. Your school, for example, cannot stop you from publishing an article simply because it criticizes the administration.

(1) Obscenity. ~~In many cases~~, speech or material is obscene if, taken as a whole (not just isolated parts of it), it meets *all three* of the following conditions:

- It appeals to the prurient interests of minors (in other words, arouses lust); *and*
- It describes nudity or sexual conduct in a way that most adults in the community think is clearly offensive for minors; *and*
- It lacks serious literary, artistic, political, scientific, or other value for minors.

(2) Defamation. Defamation consists of libel (writing) and slander (speech). ~~In many cases~~, writing or speech is defamatory if *all three* conditions are true:

- It damages the reputation of a person; *and*

- It is not true; *and*
- The person making the statement knew it was false or recklessly disregarded the issue of whether it was false.*

(3) Fighting Words. ~~In most cases~~, fighting words are those words which, when spoken directly to a reasonable person, are clearly and unavoidably likely to provoke violent retaliation. Whether words are "fighting words" depends upon the particular situation. They might include such things as racial, sexual, ethnic, or religious slurs.

(4) Incitement. ~~In most cases~~, statements are "incitement" when *both* of the following are true:

- They are clearly and immediately likely to cause other people to violate laws or valid school rules; *and*
- They are intended to do so.

As with fighting words, "incitement" depends upon the particular situation in which the statement is made.

(5) Disruption. Unless the expression falls under one of the exceptions above, the *content* of what you say is protected, and the school cannot restrict the *activities* through which you say it, unless those activities substantially disrupt the functioning of the school. This is true even if some people think that what you say is "offensive" or "in poor taste". Unless you use fighting words or incitement, you cannot be restricted because other people become disruptive in response to your expression. The question is whether you yourself are disrupting the school. This depends on your *actions* -- including the time, place, and manner in which they occur -- and not the *content* of what you say.

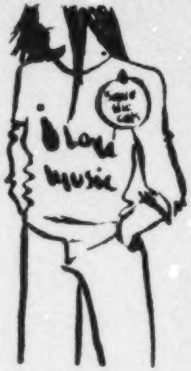
Your school must clearly specify what it means by "substantial disruption". Some examples of substantially disruptive behavior are: physically stopping other people from entering classrooms, distributing literature in the middle of a class, and holding a demonstration which is so noisy that it interferes with classes in session.

Speech

Freedom to say what is on your mind is one of the principles upon which this country is based. Only recently has the U.S. Supreme Court decided that this freedom also applies in schools. You have the right to speak freely, in and out of class, subject to the limitations on obscenity, defamation, fighting words, incitement, and disruption listed above.

Symbolic Expression

You have the right of symbolic expression, which includes wearing buttons, badges, armbands, messages on T-shirts, and other things, subject to the limitations on obscenity, defamation, fighting words, incitement, and disruption listed above.



Press

The First Amendment protects the rights of students to publish and/or distribute any form of literature, subject to the limitations on obscenity, defamation, fighting words, incitement, and disruption listed above. There are two varieties of student publications: those which are "official" and financed by the school, and those which are not sponsored or supported by the administration and are thus "unofficial" or "underground".

(1) Official Student Publications. The content of a student publication may not be censored by the administration. Even if the school supports the paper financially or in other ways, it may not use this power to control the content of your paper. The paper's advisor is there only to advise. She or he

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* The third standard -- "The person making the statement knew it was false or recklessly disregarded the issue of whether it was false" -- applies if the statement is made about a public official (including school officials) or about a public figure (such as a local or national celebrity) and relates in some way to their public role. If the statement is about a private person, the third standard becomes lower -- generally whether the person making the statement was negligent in failing to check out whether it was false.

cannot decide what is to be printed. Also, the paper's student staff must set fair submissions standards: if they allow a non-staff member to present his or her views, space must be made available for opposing viewpoints.

(2) Non-School Supported Literature. You have the right to distribute at school material that you have published off campus. You can also distribute (on school grounds) written material even if you or another student did not write it. The content of such material may not be censored. You could, however, be sued or brought to court for publishing or distributing obscene or libelous material (as defined before).

(3) Distributing the Literature. Regardless of whether the material is an official publication or unofficial literature, the school administration cannot require you to submit a copy to them before you begin distribution.* The school can require that you give them a copy at the time distribution begins. The school can prohibit distribution at those times or places which substantially disrupt the educational process. Rules in this area must be specific. For instance, the school can prohibit distribution "to students while they are in classes", but it cannot prohibit distribution "whenever classes are in session", since it is not necessarily disruptive to distribute literature to students who have free periods even though some classes are in session.

Assembly and Related Issues

All students have the right to assemble peacefully. You may gather in large or small groups, formally or informally. Unless the school can show that there is a clear and immediate probability that your actions will substantially disrupt the educational process, you may not be prevented from assembling. The school cannot require you to get permission to assemble unless it has published specific rules which:

- Define assembly (for example, are three students an assembly?); *and*
- Spell out the standards for whether an assembly will be allowed (in other words, spell out a basis for deciding that an assembly will be disruptive); *and*
- State a short, definite deadline for making the decision; *and*
- Spell out a quick, clear appeals process for use if an assembly is forbidden.*

Issues related to the right of students to peacefully assemble include:

(1) Outside Speakers. If your school allows some speakers to use school facilities, it may not prohibit others from doing so because they are considered controversial or undesirable. If a person speaks on an issue at school, a student request to hear a speaker on the other side must be honored. For example, if your history teacher brings to your class a person who speaks against the ERA, your request to hear a pro-ERA speaker must be met.

(2) Student Organizations. You have the right to form political and social organizations. For example, if, after hearing a speaker on the subject, you want to form an ERA support committee, you have the right to do so. The school may require you to register your group in order to get school funds. If there is a registration requirement, the school must allow any group to register except those which use "incitement" (as defined on page 7). It may require the name of a group contact person but it may not require a membership list. Even if a group is not registered, it has basic rights of free speech, assembly, and literature distribution, subject to the limitations above.

(3) Access to School Facilities. If your school allows some students to use school equipment or facilities, such as public address systems, bulletin boards, or duplicating machines, it must allow all students to use them on the same terms. The school may place reasonable, evenly-applied limits on time, place, and expense. Your school could make a rule allowing a student organization to make up to 500 mimeographed copies per month on the school's machine. But it would have to allow *all* student organizations to make up to 500 copies per month.

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*This is the rule in the First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico), in the Seventh Circuit (Wisconsin, Illinois, and Indiana), and in California. Courts in some other jurisdictions allow prior approval of student literature, but only if there are very narrow standards and procedures for the approval process -- i.e., regulations similar to those referred to under "Assembly" in the Massachusetts handbook.

*The issue of whether prior approval for assemblies is allowed at all has actually not been tested in Massachusetts. Assuming schools are permitted to use prior approval schemes for assembly, they would have to meet the standards set out here.

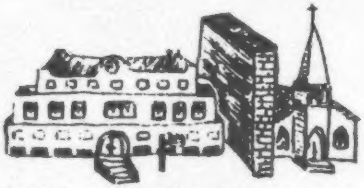
Right to Petition

You have the right under the First Amendment to criticize anything or anyone in the school. You may complain or seek change in any way you wish, such as writing letters, circulating a petition, or organizing a protest meeting, as long as you do not use obscenity, defamation, fighting words, or incitement (as defined above), and as long as you do not substantially disrupt the school. In some cases, grievance procedures have been set up in state or federal regulations (such as those related to student records and discrimination). If you feel your rights have been violated, you can use these procedures to file a complaint, and the school must respond. In other cases, unless the school has its own grievance procedure, it need not even answer your complaint, much less make the change that you request. However, you do have the right to complain and to be free from any punishment for doing so. Other actions you can take are outlined in PART TWO of this book.

Religion and Conscience

The First Amendment to the U.S. Constitution protects every student's right to freedom of religion. You may be absent from school for religious reasons, such as holy days, and you may participate in religious education classes outside of school during school time, up to one hour per week. No public funds may be used for this education or for the transportation to and from such classes.

The First Amendment also protects you by preventing your public school from promoting or supporting a particular religion or religion in general. This means that no religious services or ceremonies can be conducted in a public school or at any school-sponsored activities. The study of religion or of the Bible from a literary or historical point of view is permitted, but the topic must be presented objectively, and the school may not oppose or support any or all religions.



Your school is required to have a moment of silence for not more than one minute, at the start of each day, during which you may pray, meditate silently, think, daydream, or just sit. You are not required to salute the flag, sing the national anthem, or participate in similar activities, and you cannot be required to stand during these activities. However, you cannot be disruptive during this time.

B. RIGHT TO PRIVACY

Appearance

The Fourteenth Amendment protects your right to choose hair length, clothing, and other aspects of your appearance.* The school cannot interfere with this right by punishing you or restricting you from any school activities because of your appearance unless there is an overriding, legitimate school purpose which the school can show to be more important than this right. Such legitimate school purposes include the concern that your appearance poses a genuine threat to health or safety (for example, a bulky coat in gym), or damages school property (for instance, metal cleats on your shoes). "Neatness" and "good judgment" are not legitimate reasons for the administration to regulate your appearance. In gym, your school may require you to wear a T-shirt, shorts and sneakers. A requirement for you to wear a particular brand, type, or color of uniform, is of questionable legality and seems particularly difficult to justify, but this has not been clearly decided by Massachusetts courts.

Search and Seizure

Although the Fourth Amendment prohibits unreasonable searches and seizures, it is not clear how much protection you have in school against being searched or having your locker searched. Different courts have applied these rights to students in school in differing ways. Neither courts in Massachusetts nor the U.S. Supreme Court has ruled on this matter; therefore the rights of Massachusetts students have not yet been established. Outside of school, a search made without a warrant is usually illegal. It is still unclear whether or not school officials need to have a warrant to search you or your locker at school.

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*This right has been recognized by courts covering the majority of states, but it is not recognized in a fairly large minority.

In deciding whether a warrantless search of you or your locker was legal or not, a court would probably ask about the following kinds of things:

- the relative danger of the conduct being investigated;
- the reliability of the information that led to the search;
- whether there was a neutral, objective determination that there was strong reason to expect that the particular items begin searched for would be found on you or in your locker;
- whether the search could have been delayed until a warrant was received without risking that the evidence would be destroyed.

These are questions you probably should consider in deciding whether to challenge the legality of a search at school.

Before deciding to bring to school something which you would not want found by the administration, remember that you do not have clear legal protection against searches in school. If you or your locker is going to be searched, try to have a witness present. You do not have to give your permission for a search, and you cannot be punished for refusing to give your permission. However, your locker may be searched without your permission.* If you give your permission, the search is probably legal, and anything incriminating found on you or in your locker may be used as evidence against you. During the search, you do not have to answer questions or give explanation for anything found on you or in your locker. You may talk with a lawyer before answering questions.

Police may enter the school if they have a search or arrest warrant, if a crime has been committed, or if they have been invited by school officials.** If you are arrested in school, you have the same rights as you would have outside of school.

Student Records

[This section of the handbook has been deleted because Massachusetts student records regulations are more extensive than the federal law, the Family Educational Rights and Privacy Act. Under the federal law, parents have the right to:

-- inspect all recorded information about the student maintained anywhere and in any form by the school system (except personal notes maintained by a teacher or other official which he/she does not disclose to anyone else);

-- obtain copies when information is released to a third party or when denial of copies would effectively deny the right of inspection (copies to be furnished at a reasonable cost which may not include the staff time spent searching for or retrieving the records);

-- give or withhold written consent prior to disclosure to third parties, with certain exceptions (most notably school officials within the district who have a legitimate educational interest, the school district to which a student is transferring, and in response to a lawful subpoena or court order);

-- challenge information the records by requesting amendment or deletion, obtaining a hearing, and/or adding a statement to the file.

These rights belong to the parent alone until the student reaches 18 years of age, except to the extent that the rights are extended to students by the state, the local district, or the parent.]

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*The "may be searched" is somewhat misleading here. It is clear from the text that the authors are not saying that school officials have legal right to search lockers, which the handbook notes has not been decided in Massachusetts.

** There are probably at least some limits on the right of school officials to invite police into the school. They probably cannot do so for reasons unrelated to carrying out educational functions or insuring safety in the building.

C. YOUR RIGHTS TO AN EQUAL EDUCATION

Discrimination

Discrimination exists in many forms. It exists in any policy or practice which prevents or discourages students from participating in any school activity due to their race, color, sex, religion, national origin, or handicap. If you are attending a public school, even if you are not an American citizen, you are granted the same rights as all other students there. There are several laws which prohibit discrimination in education. They are: the Massachusetts State Constitution, Chapter 622 of the Acts of 1971 (a state law), Title IX of the Educational Amendments of 1972 (a federal law), Title VI of the Civil Rights Act of 1964 (a federal law), and Section 504 of the Rehabilitation Acts of 1973 (a federal law). The Chapter 622 regulations specify the responsibilities of schools for ensuring equal rights. Some of your rights under Chapter 622 are given below along with the procedures for complaining about discrimination in your school.

* * *

(6) Discipline. Your school cannot punish one student more severely than another based on race, color, sex, religion, national origin, or handicap. Higher suspension rates for blacks than for whites, or for boys than for girls, may be the result of subtle discrimination.

F. DISCIPLINE: GROUNDS FOR PUNISHMENT

The school has the power to enforce school rules by punishing you if you break rules. However, there are limitations on a school's authority to punish you. You can only be punished if you have broken a rule that is published, specific, and within the legal power of the school to adopt (as described below).

Published Rules*

Under Chapter 71 Section 37H of the Massachusetts General Laws, no school rules can be enforced unless they have been published, approved by the school committee, and a copy of them has been filed with the state Department of Education. Punishments to be given for breaking rules must also be published and filed. The school committee must also file a certification that a free copy of the rules is given to anyone who requests it.

This law means that you may not be punished for breaking an unwritten rule or a rule made after your action. This does not mean that, if your school has no published rules, school officials must watch helplessly as you commit dangerous, violent, or substantially disruptive acts. They may restrain you while you are actually committing a dangerous act or threatening to commit such an act.

In addition, a school official, like anyone else, may make a citizen's arrest if you have committed a felony (a serious crime), or if you have committed a misdemeanor (a less serious crime) in his or her presence. However, if she or he cannot prove that you actually committed a crime, you may sue and collect money damages for false arrest and imprisonment.

Specific Rules

You may not be punished for doing something unless the school rules give you fair warning that you may be punished for doing it. Rules cannot be so vague that people of ordinary intelligence must guess at their meaning. For example, a rule prohibiting "conduct annoying to school staff members" is too vague because different things are annoying to different teachers, and therefore you cannot reasonably predict whether or not a particular act would be found annoying. Here is an example of a vague rule, followed by a way to make it more specific. The words inside the boxes are from a hypothetical handbook.

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* Massachusetts has a specific law requiring that rules be published. Where there is no state law, courts will often allow at least some instances of punishment without written rules if the student actually was on notice thorugh some other means that his/her conduct was prohibited.

(too vague) Insolence or insubordination is not allowed.

(more specific)* Students shall not deliberately refuse to carry out a staff member's request if that request is reasonable, has a legitimate purpose, and is within the authority of that staff person to make.

Punishments for breaking rules must also be specific. The school does not have to specify a particular punishment for each type of offense. This would be unreasonable, because it does not allow for different circumstances. However, the school must give a fair warning of what punishment you may be given, by listing either the maximum penalty for each type of offense or the guidelines to be followed in setting penalties, such as amount of disruption caused, whether bodily injury resulted, and the number of previous offenses. The following is an example of a stated punishment which is too vague. We have also provided an example of one way to make the statement more specific.

(too vague) The following behaviors may result in suspension:

1. Cutting class
2. Fighting
3. Excessive tardiness

(more specific) The following behaviors may result in suspension:

1. Three unexcused absences (defined in Attendance section of handbook)
2. Physical fighting
3. Five unexcused class tardies (defined in Attendance section of handbook)

Determination of the length of suspension will depend upon the circumstances in the individual situation. (See Due Process section of handbook).

Purpose of Rules

School rules must be directly related to the educational program. You can be punished only for conduct which is related to a school sponsored activity. For example, you can be punished for seriously disrupting a class. On the other hand, you cannot be punished in school for being arrested by the police in an incident away from school.

Rules governing your conduct in school must have an educational purpose. For example, a rule about being late to school relates to a student's education, but one which prohibits long hair, "tasteless clothes", or being married or pregnant does not. However, school rules are presumed to be related to legitimate educational purposes. If you feel that a rule is not serving such a purpose, the burden of proof is on you to show it.

Overbroad Rules Violating Students' Rights

Any rule is illegal if it violates any of your rights or punishes you for exercising any of them. If a rule could be used to restrict conduct protected by the First Amendment as well as conduct which the school can legally regulate, the rule is overbroad and therefore illegal. The following is an example of an overbroad rule, and a way to write a more limited rule:

(overbroad) Student demonstrations are not allowed.

This rule is overbroad because some demonstrations might be disruptive and others would not be. Instead, the rule must be narrowly written so that only the disruptive assemblies are forbidden:

(more limited) Student demonstrations which are so noisy that classes in session are substantially disturbed are not allowed.

In general, rules regulating conduct similar to that protected by the First Amendment must be even more specific than other rules. This is because freedom of expression is so important that schools must be extremely careful not to restrict this freedom while they carry out their legitimate responsibilities.

G. DISCIPLINE: FORMS OF PUNISHMENT

If you are going to be suspended from school or suffer other serious loss of educational benefits, you are entitled to due process of law under the 14th Amendment to the U.S Constitution. This means the school must follow certain fair procedures before it can give you certain kinds of punishment. Specific procedures for due process are outlined with certain specific forms of punishment below.

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* The example given here is misleading, since it too may be vague (e.g., "reasonable," "legitimate purpose").

Corporal Punishment *

Corporal punishment in schools is illegal in Massachusetts. Therefore, school staff may not hit, spank, or physically punish you in any way. If this happens, you may be able to collect money damages from the person(s) responsible through a private lawsuit. A school staff member may, however, use reasonable force to prevent you from injuring yourself or another student or in order to protect him or herself from physical injury.

Short-Term Suspension

If you are faced with suspension for ten days or less, you are entitled to a hearing where you will receive the following:

1) an oral or written notice of the charges against you,

2) an explanation of the basis for the accusation, and

3) an opportunity to present your side of the story.

The hearing must take place before the suspension begins unless your presence at school endangers people or substantially disrupts the academic process. If immediate suspension is necessary, the hearing must follow as soon as possible.

If there is substantial disagreement about the facts, or if the suspension will result in other, more serious penalties (such as the loss of your job, your removal from an athletic team, or missing important tests which cannot be made up), then you probably have the right to more due process procedures. These include the right to question the witnesses against you, the right to present witnesses, or other procedures needed to reach a fair decision.

In any case, you must be told the maximum length of your suspension. Also, the school cannot *require* that your parents come to school for a conference before you can be readmitted. The school may request that your parents come, but you may not be punished more because your parents do not come.

Expulsion and Long-Term Suspension

The school committee may not expel you (permanently exclude you) from the public schools for misconduct without first giving you and your parents a fair hearing. It is not absolutely clear what your rights are at this hearing, but based on fairly consistent lower court decisions, you are probably entitled to the following:

1) written notice of the charges;

2) the right to be represented by a lawyer or another person acting on your behalf;

3) adequate time to prepare for the hearing;

4) the right to question witnesses against you; and

5) a reasonably prompt written decision including specific grounds for the decision.

The above rights may apply to long-term suspensions (more than 10 days), although the law is not entirely clear on this.* The hearing must be held before the suspension or expulsion begins, unless your presence in school poses a physical danger to you or to other students, or will substantially disrupt the educational process. If it is necessary to exclude you before the hearing, you must be given a hearing as soon as possible. If you are to be expelled, your hearing will be before the school committee.**

Disciplinary Transfers

Your school cannot transfer you to another school for disciplinary reasons, unless you are given due process. This means that it must give you notice of its intent to transfer you, the reasons for the transfer, and a hearing before the transfer takes place. Depending on the circumstances, you might be entitled to all the procedural rights you would have in a long-term suspension.

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* The only other states prohibiting corporal punishment altogether are New Jersey, Maine, and the District of Columbia, although it is banned in many other cities and towns in other states. Where corporal punishment is permitted, students may generally sue for damages in state court or press assault and battery charges if the particular instance of punishment was excessive or unreasonable. In addition, it may be possible to sue in federal court if the punishment was so excessive as to be "shocking."

* In fact, in most jurisdictions it is quite clear that the student has these and additional rights when facing long-term suspension.

** The statement that the hearing is before the school committee is based on Massachusetts statutes. Other jurisdictions use different approaches.

Assignment to Special Classes

Because of Chapter 766, the special education law,* you cannot be placed in a special class unless you are evaluated and found to have special needs that can be met only in a special class (a class where you receive extra services and help that you cannot get in a regular class). This means that you cannot be put in a special class for disciplinary reasons. If your parents disagree with your assignment to a special class under Chapter 766, they can appeal the decision through a process stated in the Chapter 766 Regulations.

Informal Exclusion

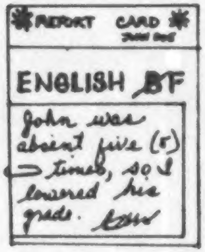
If you are told or asked to leave school without a hearing, without notification of when you will be allowed to return, or without notification to your parents, you are being informally excluded. This is illegal; you may not be suspended or expelled unless you are given due process as described in the sections above on "Suspension" and "Expulsion".

Withdrawal of Privileges

Your school may not suspend or revoke any of your privileges, such as participation in a school organization, an elected school office, or an activity unless this punishment is provided for by a specific published rule (see page 27). In addition, you must be told why you are being punished this way, and you must be given some chance to present your side of the story. You may be entitled to even more due process procedures, depending, in part, upon how long the punishment will last.

Academic Punishment

Some schools reduce students' grades for disciplinary reasons. For example. some schools lower a student's grade a certain amount for each unexcused absence (including absence because of suspension) or fail any student who misses a certain number of classes, regardless of the student's academic performance. These practices have been found illegal in other states, but have not yet been tested in Massachusetts. It is, however, clearly illegal to reduce a student's grade as punishment for expressing opinions in a manner protected by the First Amendment.


REPORT CARD
ENGLISH ~~B~~ F
John was absent five (5) times, so I lowered his grade.

Exclusion from Graduation Ceremonies

Some schools refuse seniors the right to participate in their graduation ceremony as punishment for wrongdoing, or for reasons unrelated to school (such as pregnancy), even if they have met all academic requirements for graduation. This practice has been found illegal in other states, where courts have said a student who has met academic requirements for graduation can only be excluded from the graduation ceremony if the school can demonstrate that the student will actively disrupt the ceremony. The practice of excluding students from the graduation ceremony for reasons unrelated to the ceremony itself has not yet been tested legally in Massachusetts.

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* "Chapter 766" is a state law protecting handicapped students. The same rights discussed here are protected by similar federal laws.